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The First Conference

THE first conference of the Chief Justice of the United States and the senior circuit judges of the various judicial circuits, for the purpose of securing information as to the needs of the circuits and suggestions for the improvement of the administration of Justice, was held at Washington, on December 28, 29 and 30. It was an event of real importance, since it represented the first step in the utilization of the machinery recently supplied by an Act of Congress to make the administration of Justice in the Federal courts more effective. As the Act was passed after the date it fixed for calling the annual conference, it became necessary for the Chief Justice to name a different date for this year. He sent the call out during the latter part of November, and the senior circuit judges at once asked for as much of a report as to conditions as the district judges in the respective circuits could get together within the limited time allowed.

The conference convened Thursday morning in the conference room of the Supreme Court. Chief Justice Taft sat at the head of a long table and the senior circuit judges, in the numerical order of their circuits, sat around it. All of these were present except Judge Walter N. Sanborn, of the Eighth Circuit, which was represented by Judge Kenyon. The conference sat from 10 o'clock to 12:30 and from 2 to 4:30 each day. The report from each circuit was taken up in detail and discussed, the first matter considered being the condition in the Court of Appeals. Reports showed that each of these courts has its work well in hand, the cases being disposed of without substantial delay in any circuit. Delays were found to exist in the district courts of certain congested areas, and the Supreme Court itself was reported to be about fifteen months beheind.

The object of the report of conditions in the districts was of course to locate the spots at which the dockets are congested and where help is needed, and also, what is equally important, to learn the places where the work is so small that the district judge could be spared at times for help in a congested district. The canvass was largely preliminary in character because the new judges for the twenty-four districts had not been appointed, except in five instances. However, even as things stood, some few judges, not over six, could apparently be spared from a month to six weeks for aid in districts needing such assistance. After the nineteen other district judges have been appointed, and have started in on their regular work, it will be entirely practical to have an accurate survey of conditions throughout the country. And with the whole judicial force organized as a unit, with authority to send expeditions to spots needing aid, in accordance with the provisions of the statute recently passed, the whole business of the Federal Courts in the districts should be brought into excellent shape within two years at the outside. These reports and discussions took up the sessions of Thursday morning and afternoon and Friday morning and part of Friday afternoon.

Friday afternoon and Saturday morning the sessions were devoted to a discussion of the need for additional appropriations to enable the Department of Justice to supply such additional help in the way of extra court employees and assistant district attorneys as the plans for getting rid of the congestion call for. It is obvious that additional help will be needed, if, for instance, two courts are to be running at the same time. In brief, in order to use effectively the addition to the judicial force, it is plainly necessary to supplement the other forces employed in the work of administering Justice. Attorney-General Daugherty and Assistant Attorney-General Holland, were called into conference on this subject, as was also Mr. Madden,

chairman of the Appropriations Committee of the House.

In addition, the conference took up and examined two important bills now pending before the Judiciary Committees of the House and Senate. The first was that providing for a complete revision of Federal Appellate jurisdiction for the purpose of increasing the number of classes of cases in which the decisions of the Circuit Court of Appeals shall be final, and of decreasing the number of classes in which parties can go to the Supreme Court as of right. The ultimate object is to have appeals to the Supreme Court limited to those involving important Constitutional questions and special classes of cases in which three judges constitute the court of first instance, as Federal Trade Commission, Interstate Commerce cases, etc. However, a defeated party is given the right to apply for a *certiorari*, which leaves the Supreme Court power to control the development of the law. It was the unanimous opinion of the conference that, since it is obvious not all cases can go to the Supreme Court, and that intermediate courts are of little service unless they act as "strainers," this legislation ought to be urged by all persons interested in securing greater efficiency in the courts. It was obvious that no effective relief could be had by increasing the number of judges of the Supreme Court, since one man can only consider and form an opinion in a limited number of cases. The other bill considered was that which authorizes the Supreme Court to create a commission to formulate a plan under which practice on the law side would be uniform in the Federal courts, as it now is on the equity side, and also authorizes the Supreme Court to control practice on the law side.

From the way in which the reports from the district courts were made up, it was apparent that some uniform system of keeping account of business should be adopted. This matter was discussed during the sessions, as well as the additional subjects which appear in the titles of the ten committees appointed by the Chairman. These committees were authorized to associate with them as members thereof a circuit judge or district judge of convenient residence. It was also decided that the reports from such committees might, if deemed wise by the committees respectively making them, be made at any time before the next meeting of the conference in September, 1923, forwarded to the Chairman of the conference and by him sent to each member, and, if approved by a majority of them, might be acted on and the recommendations carried out as the action of the conference. However, except in this case, reports from the committees are to be submitted to the Chairman a month before the next meeting of the conference, to be by him sent to each member for consideration, and action is to be taken on them by the conference at that meeting. Following is a list of the Committees in question:

Committee on Rules and Procedure of the Conference: Judge Knapp of the 4th Circuit.

Committee on Forms and Procedure in transfers of Judges from District to District and from Circuit to Circuit: Judge Gilbert of the 9th Circuit, Judge Rogers of the 2nd Circuit.

Committee on need and possibility of transfers of Judges: Judge Gilbert of the 9th Circuit, Judge Rogers of the 2nd Circuit.

Committee on extra expenditures needed in rent and temporary salaries for extra court employes and assistant District Attorneys in conduct of extra courts of visiting Judges: Judge Walker of the 5th Circuit, Judge Kenyon of the 8th Circuit.

Committee on Recommendations to District Judges of changes in local procedure to expedite disposition of pending cases and to rid dockets of dead litigation: Judge Baker of the 7th Circuit, Judge Bingham of the 1st Circuit.

Committee on Recommendation to District Judges of form and substance of annual and special reports on business in their respective districts for use of this conference and to members of this conference as to form of their reports to it: Judge Knapp of the 4th Circuit, Judge Knappen of the 6th Circuit.

Committee on Recommendations as to Bankruptcy Rules: Judge Buffington of the 3rd Circuit.

Committee on Recommendations as to Equity Rules: Judge Knappen of the 6th Circuit.

Committee on Better Libraries for Federal Circuit Courts of Appeal and District Courts: Judge Walker of the 5th Circuit, Judge Kenyon of the 8th Circuit.

Committee on Appellate Procedure: Judge Baker of the 7th Circuit.

Those participating in the conference are hopeful that it may become an instrument of great utility not only in cleaning up the federal dockets but also in promoting improvements in the courts of all the states.

SIGNED ARTICLES

As one object of the AMERICAN BAR ASSOCIATION JOURNAL is to afford a forum for the free expression of members of the bar on matters of importance, and as the widest range of opinion is necessary in order that different aspects of such matters may be presented, the editors of this JOURNAL assume no responsibility for the opinions in signed articles, except to the extent of expressing the view, by the fact of publication, that the subject treated is one which merits attention.

THE PRESS AND THE ADMINISTRATION OF JUSTICE

Cloistered and Complicated Administration of Justice in America, as Compared with Simplified Methods Employed in England, Keeps Understanding of Great Principles of Law from Lay Readers, Who Are Most in Need of It

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THE legal atmosphere in America connotes dusty tomes and deliberate reasoning by trained minds upon technical subjects, in which no place is found for the layman, the only actor with an interest. Traditionally the administration of justice in America is cloistered. The sensational alone, concerning the courts, finds a place in the popular press. It is within this compass that the American layman's knowledge of the administration of justice is limited and with these lurid stories is his sentiment flavored. The sacred truths and great principles that might be put within his reach, are kept from the lay reader, who is not only capable of understanding but is most in need of them. On the contrary, the reports of trials in England made by the London *Times* are accepted as if official, so correctly and fully are they reported. Obviously this enterprise is in response to a keen interest and understanding by laymen, who demand it, and thereby give it the quality of "news." Otherwise they would not be published. The student of English juridical history and contemporaneous times will not consider himself far afield in attributing this commendable popular attitude to two things—the scientific operation of the Courts by the judges and lawyers and an intelligent, patriotic cooperation of the secular Press. It is these two elements in the administration of justice to which it is desired to direct the attention of those deeply interested in this sacred subject.

It may be observed without the danger of invidious comparison, that the lively individual interest in the Courts of England is not because of a greater general knowledge of legal processes or of a higher general intelligence. The explanation seems to be found in the simplicity of the operation thereof. It is a trial of facts, they observe in the courts, regulated by the fixed law of the case and not one of technicalities controlled by keen wits. Spectators are not drawn to the court room by the thrill of sensationalism, the diversion of minstrelsy or the entertainment of oratory, for none are to be found. One might as well be in solemn St. Paul's so quiet and decorous is the atmosphere. Every ounce of energy leads in its deliberate prodding way to the final judgment for which the case was instituted. There are no useless, senseless, peevish or obstructionist diversions. "Exceptions" and "objections" by lawyers, that necessarily but materially mar American trials, are so rare as to startle or even offend the opposing lawyers, who pride themselves, as sworn officers of the court, on keeping within the rules made by them. Nothing but such conduct and such reverence could so inspire and hold the faith and respect of English, or for that matter, American laymen in the agencies, human and otherwise, designed to administer justice. That may be taken as the lay human equation.

England being the home of the highly technical common law practice and procedure for nigh on to eight centuries, one unfamiliar with modern legal history is justified in being agreeably surprised. The explanation is simple. The fact is that all technicality of every nature was abolished from the courts, the moment that Parliament turned over their practical operation to the judges and lawyers and thereafter, devoted itself exclusively to *making* laws instead of trying also to *administer* them. An opera bouffe was converted into a shrine. That is the underlying distinction between American and English courts.

It is the explanation of the simplicity of the English courts and sets in opposition the conflicting technicalities of American courts. It is the difference between a locomotive built and operated by practical mechanics and one built and operated by a Board of Directors. Each class is good in its place and each is bad out of it. It is the reason the lay press can intelligently follow and report the proceedings. The one object in the English courts now is to ascertain the elusive truth, the issue to be tried, to simplify that in advance by way of admissions of undisputed facts and also the production of documentary evidence for examination before the trial. It is a businesslike procedure, devised to administer justice, that appeals to the layman and is not a game of hide and seek to bedevil an opponent, confuse the jury, trip the judge, obfuscate the layman and impress the gallery with a super-heated knowledge of a difficult, technical game, that ought not to exist.

The English processes being controlled by common sense and directed by a simple sense of justice are understood by laymen, are intelligently and interestedly followed and thereby, in editorial estimation, the daily activities of the courts and the efforts of the lawyers to improve the courts is "news." Publishing it therefore, is an economic as well as a patriotic matter. This is the explanation vouchsafed from a very high source. But, as we shall see, the newspapers created the appetite to which they now so profitably and patriotically cater. Manifestly there are yellow journals in England. There are also cases of smallpox in that healthful and highly civilized country.

The far reaching result is a popular interest in and respect for the courts, for judges and for lawyers, the corollary to which is a mighty and consecrated effort on their part to live up to expectations, and the people are the beneficiaries. Moreover, the daily reader visualizes the administration of justice through the soul and spirit of the editors and not through the jest of the minstrel or the spleen of the nihilist. The courts are not necessary evils to be avoided through arbitration, compromise, or even abject surrender of rights. The courts are to Englishmen a real city of refuge, that they shield as their best friend. Justice is dignified. Indeed is is hallowed. The judges hold office for life, or during good behavior and competency, and receive a

salary of $25,000 a year. They are appointed by the Lord Chancellor because of peculiar fitness, and not by popular vote or as a political reward. The layman, conscious of the necessity for a high efficiency, realizes his limitations in making the selection. The appointee is the man approved by the lawyers, who willingly stand responsible for his administration and his conduct.

In ages past we are told that justice is the greatest interest of man on earth. And it is so. Whether or not that sentiment be given expression, it lies deep in the heart of mankind. There can be no civil liberty nor property rights without it. There would be no peace and no commerce. There would be no civilization. There would be no secular Press. Of its relation to government this, with all due respect, may be said: Of the three departments of Government, the Executive and Legislative might cease their activities for a given time without other harm than inconvenience, but chaos, murder and rapine would result should the courts suspend functioning for one day. Might and not right would become the measure of human relations. Is there within the comprehension of man a more important thing than the perfection of the courts and the machinery by which they are regulated? Is there one to which less serious and thoughtful attention is being given by the secular Press, by way of educating the people to its sacredness and importance? Is there one to which appropriations are more grudgingly given? Is Congress, is the Press, are the people undervaluing them, or are they merely indifferent? Where so much is involved one would expect a determined demand that the courts be regulated by the highest trained and consecrated agencies? That is the solemn conviction of the English Press reached after years of search for the truth; it will soon become the first thought of the American Press, a Press that has ever stood for the best interests of its country. It is the unanimous voice of the organized lawyers of America. And to their constant and sustained petitioning, Congress has turned a deaf ear.

Now the Englishman evidenced his conversion by his works. After fifty years of a struggling Parliament, surrendering a little control over the operation of the courts here and a little there, from about 1823 to 1873 (The Selborn Bill) Parliament cut the last thong that bound the judges and lawyers and set them free to scientifically perfect the detail machinery of the courts. And a new era opened in English jurisprudence. Thus the English laymen and lay Press won a great victory, for the lawyers gratefully acknowledge that they could not have achieved it alone. They would have gone on fighting for another half century, if for no other reason than the lack of public confidence now so vigorous and hearty, in the proposed evolution. For an evolution it was. The public and many good lawyers and some judges, as well as many able statesmen could not be brought to believe that the administration of justice ought to and could be effected by the simplest of methods—free from mystery and doubt and entanglements. Through the clouds and fogs of technicalities brought down through the centuries and still existing in America, they had never seen justice. The litigant's interest was as naught in conflict with the perfection of a "declaration" or a "special plea," over which hours and days were squandered. To banish this chevaux-de-frise with one stroke and permit of a direct admission to the very presence of justice seemed incredible. Their incredulity is as easily appreciated as their present familiarity and intelligent interest, faith and support.

That will be the principal achievement of the American Bar Association resolution, recommended by Chief Justice Taft, and embodied in Senate Bill 4066 and House Bill 13074, just introduced and now awaiting the action of the Judiciary Committees of the two Houses of Congress. Conscious of a need by the public of a greater familiarity with the practical details of the administration of justice; and inspired by a splendid faith in the good impulses of the people, whose servant he is, the great Chief Justice proposed that the truth should be put before them. The Commission proposed to be created will throw light upon a subject that is much needed in America. A light that will reach them through an intelligent and patriotic daily Press, educated and instructed by a scientific, unbiased report. The proposed statute in part reads as follows:

> That there shall be created a commission, the personnel of which shall be appointed by the President, and to be composed of two Justices of the Supreme Court, two circuit judges, two district judges, and three members of the bar of high standing and qualified by learning and experience, such commission to prepare and recommend to Congress any necessary amendments to the present statutes and the Judicial Code, tending to the simplification of the system of pleading, practice, and procedure to be used in all actions, motions, and proceedings at law or in equity and in bankruptcy or whatever nature, by the circuit court of appeals and the district courts of the United States and the courts of the District of Columbia, so as to promote the speedy termination of litigation on the merits, and a unit administration of law and equity in one form of civil action.
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> Sec. 2. The commission shall make its report to Congress on the first Monday in December, 1923.

How did the Englishman go about accomplishing this historic result, that has proven to be the wonder of the civilized world, is obviously an interesting question. He did no more than the Founders of Government in America had proposed and provided and intended a century before in their Federal Constitutional Convention held in 1787. It is not too much to claim that this Convention supplied to the English the idea that the Legislative Department should make the laws and the Judiciary Department should administer them, although there are many lawyers in the membership of the Legislative body. The connotation to that principle is that the Judicial Department—the judges and lawyers—should perfect the detail machinery of the courts for, obviously, the right to prescribe the manner of doing a thing is the power to control the result. This is the serious error that Parliament had theretofore committed and which it thereafter refrained from doing. Parliament devoted itself exclusively to making laws, and ceased trying to administer them through statutory regulations or otherwise.

As was said in the first lines of this article, the responsibility of administering the law fell upon the shoulders of the judges and lawyers, where it logically belongs and they arose to and proved equal to the sacred task, greatly improving their own status in the effort. For the first time in history, there was prepared and put into effect in the courts a permanent scientific correlated system of simple rules for the regulation of the operation of the courts, free from the substantive law that they were designed to administer. The beneficent result has already been shown. Another result is that there is no difficulty on the part of the Press in visiting responsibilities for a failure of justice. The laymen now knows whether it is a bad law that caused the mischief or a good one badly administered. There

is no confusion of actors. That is why the London *Times* can interestingly and correctly report an action to recover on a note, to collect an open account, to ascertain damages for a personal injury or fix a disputed boundary. That is why the Press can intelligently comment on the practical functioning of a court and can tell the public whether the judge, the lawyer or the Parliament deserves criticism or praise. Under present conditions in America the helpless and innocent judge alone is blamed. The lawyer is often praised for his dilatory and obstructionist tactics, as will presently appear, because Congress forces him to that course.

We spoke of the English as having adopted the American idea of *enactment* by the Congress and *administration* by the courts and that Congress had unwittingly suppressed it. That calls for a sharp division of power between the two departments, if proper results are to be had or, in fact, if the Government shall stand. It is well to quote some of the comments made on the Convention floor, uttered in 1787, after stating that the fear was unanimous that Congress might eventually do just what it has done—absorb the powers of the Judiciary Department as far and as rapidly as permitted. James Wilson of Pennsylvania, aiming to provide for the protection of the Courts against the inroads of Congress, proposed a coalition between the Executive and the Judiciary. It was seconded and supported by James Madison of Virginia in these words: (Scott, Madison Papers 399):

> It would be useful to the Judiciary Department by giving an additional opportunity of defending itself against legislative encroachments. . . If any solid objection could be urged against the motion, it must be on the supposition that it tended to give too much strength, either to the Executive or the Judiciary. He (Mr. Madison) did not think there was the least ground for this apprehension. It was much more to be apprehended that, notwithstanding this cooperation of the two departments, the legislative would still be an overmatch for them. *Experience in all the States had evidenced a powerful tendency in the Legislature to absorb all power into its vortex.*

The failure of this coalition plan has proven to have been a wise move. But it has likewise transpired that it created the one weak point in the Constitution of the United States. It left the Judiciary Department exposed to the depredation, even to absorption, by the Legislative Department. Congress has taken advantage of that weakness. It may have felt obliged to do it, because of the past indifference of the lawyers, and there is much in the argument. But two wrongs do not make a right. The present generation of lawyers are demanding their opportunity to perform their sacred duty. At present it not only tells the courts what they may do, which is proper, but *it tells them exactly how they shall do it,* which completes the absorption. The smallest detail in the operation of the law courts is regulated by statutes. The judge is a moderator, subject to the hostility of the lawyer, and is the victim upon whom all blame is placed. That deplorable fact cannot too strongly be stressed if the people are ever to understand the real spirit of the courts. There is one truth that no statesman will dispute, which is, that the power to direct the manner of doing a thing *is the power to control the result.* It does not require a trained or a technical mind to understand that truth, and that the people are receiving legislative instead of judicial justice. The English Press grasped it and passed it to the people. When the American Press undergoes the same conviction, the great underlying principle given concrete form by the Founders of America will be brought back to the home of its birth.

Inasmuch as the organized judges and lawyers, supported by the doctrine of the Founders, influenced by the success of a concrete example in the English courts and convinced by their practical experience, are earnestly seeking the power to perfect the American courts, why has not the great American Press, like their English brethren, come to their aid? If one be permitted to venture an opinion, it is because there has been offered no concrete plan, so free from technicality as to be readily taken hold of by common sense and analyzed and understood. Neither an editor nor a reporter can grow enthusiastic over a simple thing shrouded in mystery by technical and ofttimes meaningless terms. It is not believed that the Press of America entertains a single doubt as to the competency or fidelity of the judges and lawyers to simplify and modernize the administration of justice. But the Press has not learned that they are the only persons who should do it. It is repeated that the concept of the American Press concerning the agencies of justice is that it is a cloistered thing. Moreover, the impressions and influences operating upon lay editors in the past must not be lost sight of. The detailed machinery provided by Congress for regulating the law courts is so technical as not to be understood by but few lawyers! More text books have been written in the effort to elucidate the subject than upon any other, with few exceptions. It would be foolhardy indeed, then, for a layman to essay a discussion or report of it and its workings. And, inasmuch as this so called "practice" leads inevitably into a jungle of technicalities, there is often no concrete result of public interest to report or discuss. To the layman it is not sheer foolishness, it is downright wickedness, from which he withholds his sympathy or wholly ignores it. One must not be unmindful that the thing has been condemned by both Presidents Taft and Wilson, the American Bar Association, forty-five State Bar Associations, and a great array of judges, lawyers and teachers; that its abolition has been demanded by many civic and commercial organizations. Having been brought up in this atmosphere of doubt or disgust, it is illogical to expect the participation of the lay Editor in the absence of a concrete program, that appeals to his reason. That done, he stands ready to cooperate. The investigation and report of the proposed Commission, heretofore discussed, it is believed, will correct that serious difficulty. It will put the lay editor upon the same plane as the lawyer, as to the practical operation of the courts. He will watch its development step by step and bind the thoughtful American people to their courts with the unbreakable cords of understanding and reason. It is the beginning of a new American era as distinct as that of 1873 in England. For that reason the Press is not likely to observe with patience any delay in Congress in authorizing the creation of the Commission.

It will prove helpful in the circumstances, to emphasize the importance of the practice and procedure—the detail machinery—of the courts. Upon it depends a proper administration of justice. It is in fact the most vital element. Let us illustrate. A city might construct the most modern and capacious reservoir and fill it with the purest of water, but the quality and quantity that reaches the consumer will be measured by the pipes through which it is conveyed. So, although Congress may fill the Code with the wisdom of a Solomon, the potency and merit of the law will be meas-

ured by the machinery through which it is administered to the people. If the practice and procedure, forced upon the courts by Congress, tends to clog instead of expedite; if it be highly technical and conflicting instead of simple and direct; if it be expensive instead of reasonable in cost, manifestly the administration of justice will be a failure in spite of beneficent laws and good intentions. It is the explanation why certain Senators have stubbornly resisted—it connotes the surrender of certain legislative power, although improperly exercised.

It is the layman, therefore, who knows best that justice deferred or made difficult or costly is justice denied and it is he who suffers most on account of it. There is no escape or consolation for him. He can only bemoan his misfortune. Knowing not where to direct his criticism he falls upon the helpless judge because he happens to be the participant nearest to him in apparent authority. The judge and the lawyer console themselves with the statutory excuse that they do the best they can with the legislative restrictions and limitations thrown around them. But the point is that the layman believing in the existence of a great reservoir of justice, and ignorant of what we have tried to explain, cannot understand.

So, though the wisest, purest and most highly qualified men be selected as judges, indeed though Solomon in all his wisdom preside, his usefulness and merit will be measured by the practice and procedure regulating the operation of the courts.

Let us see just how far this wrong extends. Should the judge, in the effort to prevent a miscarriage of justice occurring in his presence, depart from a statutory rule of practice and procedure arbitrarily provided by Congress, an appeal would be taken and the judgment would be reversed. Obviously the reversal would be based upon a technicality of procedure and practice and not upon the merits of the case. The salient fact is that the innocent litigant suffers from the unnecessarily wicked thing that he is taught to respect and trust. So the judge is not to blame. He deserves sympathy. Nor is the lawyer to blame for he is also sworn on his oath of qualification to uphold and enforce all statutes enacted by Congress, without distinction, including those regulating the practice and procedure, however technical and conflicting and disastrous to justice they may prove. One feels wholly justified in charging this to be one of the most indefensible and wicked things of which Congress has ever been unwittingly guilty. It is a thing that the lay Press grasped in England with all of its vigor. The Press saw that lawyers and judges must be set free from this bondage in order that their duty as officers of the Court might be performed and the people obtain the benefit of their learning, wisdom and experience, and patriotism, instead of suffering from their enforced enmity. The American Press will eventually grasp this point. Then, and not till then will the administration of justice be perfected in America. It is the thing around which all else revolves.

The daily experience and knowledge of the science of government have taught the judges and lawyers that the operation of the courts ought not and need not be promotive of litigation and strife at all, nor even of a dispute that the judge may not instantly settle without risking a prejudicial error. In other words they know that the practice and procedure of the courts ought to be a mere detail of a trial, instead of its main feature as it now is. In spite of this fact, over 50 per cent of the time of the courts, by actual figures, is now taken up on purely procedural and practical matters that have no bearing whatsoever on the merits of the case. For all of this the litigant pays. No reference is made to the number of times that a litigant loses out entirely. This is the truth that the secular Press must take to laymen, which is the only logical means of conveyance. Moreover, that voice and that only can be spoken loud enough to be heard by the Law Makers selected by the people. Twelve years of American appeal and a half century of English history have fully demonstrated that truth.

Now certain hardships arising from the practice and procedure, forced upon the courts by Congress, have been so severe in the past as to cause the American Bar Association to pass resolutions and to send strong committees before Congress by way of protest and petition for temporary relief, until a simple scientific practice and procedure would be permitted by Congress. Many years were consumed in these visits. The lawyers have exerted themselves to their utmost. Some illustrations may be given. Congress was finally persuaded to permit a case to be transferred from the equity to the law side of the court, when instituted on the wrong side. Formerly the judge was required to dismiss the case although then too late to be brought on the right side. And the citizen lost without understanding why! The absurdity of this old custom is worth stressing. Procedure and practice, as well as the law, was arbitrarily divided by Congress into "law" and "equity" although a single judge sat on the one bench in the same courtroom. Now if a case were mistakingly brought with the "equity" instead of the "law' procedure it had necessarily to be thrown out and justice refused. It is as if Congress required of an applicant for equitable relief to wear a certain kind of uniform. If it transpired that his uniform was not entirely regular, although he had gone all the way to the Federal Supreme Court to find out, he would be kicked out of court by the Marshal. Now Chief Justice Taft's recommendation of a *"unit administration of justice,"* heretofore cited, would do away with the dangerous distinction between the two procedures. The principles of equity, that is the law, could and would be as readily preserved and applied and technicality deprived of its deathly sting. Formerly, if a defendant had a counterclaim against a person suing him in equity, it was necessary for him to file a separate and distinct cross-bill instead of setting it up in the answer that he was obliged to file and where it logically belonged. Congress was finally prevailed upon to correct that absurdity. (Judicial Code §§ 274-A, 274 b, 274 c. Law & Equity Bill, approved March 3, 1915). Formerly a defect in the averment of citizenship in the pleadings caused the arbitrary dismissal of a suit. The Court, under the revisal just mentioned, is now permitted to amend the pleadings at any stage of the case so as to perfect the allegation and save the poor litigant from being kicked out of court. The lawyers advocated that reform. In order to reduce the number of reversals on technicalities Congress, after earnest appeals by the American Bar Association and many personal efforts by Judge Everett P. Wheeler and his Committee, was induced to enact the Act of February 26, 1919, substantially as follows: "The Court shall give judgment . . . without regard to technical errors or defects or to exceptions which do not affect the substantial rights of the parties." The inconsistency of the thing is this: That Congress recognized the destructive nature of the procedure and

practice it forced upon the Courts but refused to abolish it although it felt constrained to muzzle it by way of neutralizing its wicked results. And it did this by instructing the Judge to pay no attention to the machinery it provided if it did harm. It is as if Congress had refused to permit the lawyers to kill a rattlesnake, that Congress had inadvertently put into the courtroom, but told the Judge to keep an eye on it. Until Congress interfered and changed it, this beneficent practice had been the custom with the Courts. Judge Story, in McLanahan vs. Insurance Company (1 Peters 170-173) decided in 1828, said: "If, therefore, upon the whole case, justice has been done between the parties and the verdict is substantially right, no new trial will be granted, although there may have been some mistake committed at the trial." Again Congress granted the right of appeal to the Federal Supreme Court but it provided more than one way of perfecting it, each separately conditioned. If, therefore, one went upon a "writ of error" when a "certiorari" happened to be the prescribed method, again he found himself in the wrong uniform and again he was figuratively kicked down the steps by the ever ready Marshal. So highly technical were these particular "processes of justice" that the members of the United States Supreme Court themselves could not agree upon the correct one. Dahnk Co. vs. Bondurant 5 U. S. Sup. Crt. Ad. Op. (1921-2) p. 114, 115, 120. Congress certainly performed this work of confusion with disastrous exactness!

In the face of a record like this; with the great organized Bar of America underwriting a unanimous plea for relief and insistently calling for action; with a chorus of dissatisfaction arising from the people; with an example in England that is the marvel of the world; and with a statutory practice and procedure that could not be much worse, one wonders why Congress has not responded. Let us review some of the results. Statesmen would be instantly relieved of what must be a heavy burden of labor; there would follow an assurance of the proper administration of the laws they enact; there would result a shifting of the sacred responsibility to the judges and the lawyers without the loss of eventual control by Congress, for it could promptly take back the power it had given; there would be a happy response to a popular demand, for forty-six State Bar Associations and all the great national, civic and commercial organizations have endorsed it; and there would be a concrete evidence of the intention of Congress to cooperate with its coordinate Department of Government that would inspire a new faith in the people.

This question we have endeavored to answer. Congress is a representative body. It seeks to respond to the voices of its far distant constituents. Those voices must be transmitted to be heard. The secular Press is, always has been and always will be the means of communication. So far Congress has heard the voices of the lawyers only, and every legal journal in America has spoken. It is awaiting to hear from the laymen through the secular Press—in that, the statesman will recognize his constituents' voice.

REGALIAN THEORY REVIVED IN PHILIPPINES

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BY the Treaty of Paris, signed December 10, 1898, Article VIII, the Kingdom of Spain ceded to the United States all buildings, wharves, forts, public highways and other immovable property belonging to the public domain, and as such belonging to the Crown of Spain. In addition, it was provided that this relinquishment or cession should not in any respect impair the property or rights which by law belonged to the peaceful possession of property of all kinds, of provinces, municipalities, public or private establishments, or of private individuals, or whatsoever nationality such individuals might be. These provisions applied expressly not only to Cuba, Porto Rico and other islands in the West Indies, but also to Guam and the Philippine Archipelago.

In section 21 of the Organic Act of Congress of July 1, 1902, it was provided that all valuable mineral deposits in public lands in the Philippine Islands, both surveyed and unsurveyed, were declared to be free and open to exploration, occupation, and purchase, and the land in which they were found to occupation and purchase, by the citizens of the United States or of said islands. In the same Act the procedure for location, recording, and application for patents and the granting of the same was detailed. The Philippine Commission, and afterwards the Legislature, passed several Acts for carrying out the foregoing law.

At time of the cession of the Islands to the United States the Regalian theory, that the King possessed the prerogative or the right in the property of private persons as well as in all public lands, concerning the presence of minerals in the soil, and that a special grant was necessary to transfer the same, was in force. It was generally supposed, however, that on the relinquishment of sovereignty by Spain, the Regalian doctrine had been abrogated, as having its origin in the autocratic government of kings and no place in a country with republican government. A Torrens system of land registration had been put into effect as early as November 6, 1902 (Act No. 496), and various cadastral survey Acts had been enacted. The members of the bar and property owners generally considered that grants to any of the lands formerly embraced within the territory of Spain transferred all the interest in the soil, including all rights in the sub-surface. A deed or patent which did not contain an express reservation necessarily included not only the surface and agricultural rights, but everything embedded in the substratum. The Regalian theory had never been recognized by either the Federal or the State governments in the United States, although it had been in force in much of their territory at the time of its acquisition.

This complacence received a severe shock when the Supreme Court of the Philippine Islands in the case of Lawrence vs. Gaduño (R. G. No. 16942, October 31, 1921—not yet published) held that minerals found below the surface of the land concerned belong to the State and could not be sold legally to another separate from the rights granted to the original owner of "agricultural land." This decision was rendered by Asso-

ciate Justice Avenceña and three concurring Filipino Justices, with three American Justices dissenting, there being two vacancies in the Supreme Court at the time.

In the case mentioned a *composición con el estado* had been granted the former owner of the land in question. James Ross purchased these rights and in 1905 obtained a Torrens title. The *composición con el estado* described it as an agricultural land grant from the Spanish Government. It made no mention of the minerals therein, the land being described merely by its boundaries. In September, 1920, James Ross sold to W. H. Lawrence all the petroleum, oil and natural gas, that might be found below the surface. This contract Lawrence presented to the Register of Deeds of the province, asking for its inscription and the issuance of a new certificate of title. This was refused by the Register of Deeds on the ground that there was no authority of law for such an entry, as it was the transfer of only an interest in the land and, therefore, Ross could not sell, transfer or deliver it. A petition for mandamus was presented to the court to compel registration and issuance of title.

The court based its opinion upon several grounds in its refusal to grant the mandamus: The ownership of minerals (including *combustibles*) belonged to the State as a principle adopted by Spanish legislation (especially the law of July 6, 1859) and by decrees of the Superior Civil Governor under Spanish administration; no one had the right to exploit minerals in lands without a special concession from the sovereign power; the title granted to the land in question as agricultural land, did not include the minerals which might be found below the surface; upon the cession of the Philippine Islands to the United States, the fact remained the same—the title to minerals in such lands was in the State; to this date the Congress of the United States has not passed any legislation which in effect includes the title to the minerals in the ordinary sale of lands, nor has the Philippine Legislature passed any law changing this doctrine; the new Public Land Act (No. 2874), which went into effect November 29, 1919, provides in section 108 that patents or certificates under provisions of that Act do not include or convey the title to any gold, silver, copper, iron, or other metals or minerals, or other substances containing minerals . . . coal, coal oil, contained in lands granted thereunder, but these remain the property of the Government; even if the provisions of the latter Act do not affect concessions granted before the passage of that Act, it is clear that concessions made by the Spanish Government did not include the right to the minerals in agricultural lands; Act No. 2932 concerning petroleum, mineral oil and natural gas lands shows that the Philippine Legislature did not necessarily include the minerals found in grants of land generally, as it permits exploration of the mineral products by persons other than the owner of lands; that the inscription of the Torrens title to the land in the present case includes no more rights than are necessarily involved in the title; and furthermore, no more rights can be claimed than are allowed by the laws, the Constitution of the United States and that of the Philippine Islands, and the statutes, or those which exist by virtue thereof. It followed that the minerals found below the surface of this land belong to the State and cannot be legally sold by James Ross to the petitioner. The certificate prayed for cannot issue as the title does not embrace all the rights mentioned.

Mr. Justice Johnson wrote the dissenting opinion for the American Justices. This opinion claimed that the majority decision revived the Regalian theory in force before American occupation, but which ceased to have force on the cession of the Islands. Neither the President of the United States nor the Governor of any State possesses the prerogatives or patrimony formerly claimed by the Spanish Crown. The latter ceased upon the transfer of sovereignty. The rights of the officials mentioned are the same as those of any other citizens, and are created and defined by law. The President of the United States acquires his property the same as any other citizen.

A decree of registration under the Torrens system is conclusive upon and against all persons, including the Insular Government and all branches thereof. The title affects not only the surface, but also the substratum thereof in perpendicular lines with the limits of the surface. The real purpose of the Torrens system is to quiet title to land. The United States and all of the States uniformly regard the patent granted to any of the lands formerly embraced within the territory of Spain and France as transferring *all* the interest which it possessed in the soil, including both the surface and the subsurface and everything embedded or connected therewith. A deed or patent which does not contain an express reservation is an *absolute* conveyance, and includes not only the surface, but everything embedded in the substratum.

By the Act of Congress of July 1, 1902, patents for mineral lands were to be granted without any reservation whatever. The history of land titles to public lands in the United States shows that the Government of the United States did not intend to make any reservation whatever in the substratum. There, when no reservation was made in the patent, the patentee got the absolute fee simple title, that is, not only the title to the surface, but to all the minerals embedded in the soil. In fact, the said Act of Congress says:

> When in any lands in said Islands entered or occupied as agricultural land but not yet patented, mineral deposits have been found . . . the claimant shall pay the same amount which he should have paid had the claim been originally to mineral lands.

Mr. Justice Johnson continues:

> Even if it had been the intention of the United States that the Government should reserve the title to the minerals in agricultural land grants, there is a severe restriction upon the operation of the Regalian theory when land has become the property of private persons before American occupation. Article 426 of the Civil Code provides among other things that "on land of private ownership no prospect pits can be sunk without the previous permission of the owner or of the person representing him."
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> "By the provision of the Civil Code we see," says Manresa in his Commentaries on the Civil Code, "the great respect which even the Spanish Government has for the right of private property." By that provision even Spain, under the Regalian theory, renounced her rights to minerals in private property unless permission to excavate them could first be obtained from their owner. And, of course, no permission would be granted except upon conditions of mutual advantage.

Under the Government of the United States, even in lands acquired from Spain where the Regalian theory had theretofore been in force, the ownership of minerals contained in such public lands patented to an individual, passed with the patent, and the lands thus patented cannot be taken up for mining purposes under the mining laws, rules and regulations. The Government, in the absence of an express reservation in the patent, cannot grant permission to go upon patented lands for the purpose of working mines thereon. The remedy prayed for by the petitioner should be granted.

LABOR, RAILROADS AND THE PUBLIC

Country Is Now Entering Upon a New Era of Labor Agitation for Policies Vitally Affecting Our Institutions—All Class Demands Must Be Impartially Scanned—Only One Sensible Method for Adjusting Railroad Labor Controversies*

By Hon. Ben W. Hooper
Chairman Railroad Labor Board

A COUNTRY judge and farmer from the mountain section of Tennessee would naturally be expected to run on to a lot of surprises in Chicago. This would be especially true, if he were brought here and pitched into a den of Numidian lions and Bengal tigers and told to conciliate and pacify them with his naked hands. This is much the position of a member of the Railroad Labor Board, as he enters the lair of the hardboiled railway executive and the radical labor leader, armed only with the gentle, unenforceable admonitions of the Transportation Act, 1920.

My experience in dealing with the supremely vital questions of the transportation industry has given me the same mingled feelings of satisfaction and apprehension that were expressed by a colored boy from my town who was in the over-seas army in the Great War. He wrote back to his brother, "I wouldn't take a thousand dollars for my trip, if I git back."

There are some phases of the labor situation in general, and of railroad labor conditions in particular, which have not yet been as forcibly impressed upon the public as they are destined to be. This country is entering upon a new era of labor agitation, new in the sense that henceforth organized labor purposes to participate in state and national politics much more openly and actively than it ever has before. This enlarged political activity will not, in all probability, at the outset take the form of a new party. It will be carried on along the lines so successfully exemplified by the anti-saloon league. The latter organization by working inside the lines of both the old parties accomplished vastly more in a shorter time than would have been possible with a Prohibition third party.

The importance of this political labor movement lies in the fact that the policies it will undertake to advance affect most vitally the fundamentals of our institutions, social and governmental. Indeed, some of them go more deeply to the root of the existing order than many of their proponents seem to realize.

In so far as this movement proposes to carry into the public forum and ultimately to the ballot box the perplexing questions arising from the complexities of modern industry, it should not arouse resentment in any quarter. Rather, it should be welcomed as an appropriate utilization of our constitutional machinery for the settlement of public questions. It should be met by the people with the open-minded inquiry, "To what extent are the political demands of labor wise and just, and to what extent are they inimical to the public welfare?" The fact that a large percentage of the politicians in both parties will appraise this movement merely from the standpoint of the number of votes it can bring in or drive out will make it incumbent on citizens in general to emulate labor in the exercise of independent nonpartisan thought and action. There are, of course, two elements of folks who cannot do this. One is that class of men who have been petrified by prejudices of long standing into unshakable opposition to all demands coming from labor. The other is that scattering element of intellectual insects, known as the pink-parlor socialists, who have usually inherited some money and acquired a perverted social "urge," which impels them to gulp down any economic flyhook that is dangled in front of them.

There is one safe rule for the people to follow in their appraisal of the demands of any class of citizens for legislation affecting the interests of that class. Such demands being selfish, no presumption exists in their favor. They should be subjected to the clear-eyed inspection of patriotic impartiality.

The political program of the labor leaders, to which they are endeavoring to secure the adherence of the rank and file of their constituency and of the people at large, embraces as its paramount proposition a demand that the courts be shorn of certain of their powers, and, to this end, that the Constitution of the United States be radically amended. Two definite demands are made: First, that the injunctive powers exercised by the courts in connection with strikes be withdrawn or greatly limited; and, secondly, that the constitution be so amended that Congress can set aside a decision of the Federal courts which pronounces an act of Congress unconstitutional.

In furtherance of this program, the most virulent attacks have been launched against the judiciary. There are men, organizations, and periodicals in great number that lose no opportunity to preach the pernicious doctrine that the courts are dominated by the rich and powerful and that they deny justice to the poor and weak. It will not do to underestimate the effectiveness of this wide-spread effort to poison the minds of millions of people against the courts of our land. This propaganda is fed to an element of people who, by reason of deficient training and highly sensitized class-consciousness, are peculiarly susceptible to its baneful influence. When a man becomes thoroughly saturated with this distrust of the courts, he is no longer a good American citizen. His mind is befogged with dark suspicions and he nurses a fancied grievance against his government. He is converted into a fit instrument of disloyalty and treason. The man who persistently labors to destroy the faith of the people in the courts, whether he be a bomb-throwing anarchist or a United States Congressman, is guilty of the most insidious treachery to the republic.

There are, generally speaking, two elements of people engaged in this war on the judiciary: First, those who fear restraint from the perpetration of some wrong; and, secondly, those political opportunists

*Address at Annual Dinner of Illinois State Bar Association at Chicago, Dec. 2, 1922.

who thrive on the discontent of the first-mentioned class.

Granting that the imperfection of human judges will occasionally result in miscarriages of justice, every man who has first-hand knowledge of the courts of our country knows that there is not one case in ten thousand where the judgment of a court is dictated by improper motives. In that infinitesimal percentage of cases in which courts wilfully commit wrongs, the remedy is not to be found in the indiscriminate condemnation of all courts.

This promiscuous onslaught on the judiciary is really equivalent to an anarchistic attack on any and all forms of civilized government, for the reason that the time will never come under any form of government, when courts can be dispensed with. There will always be laws and there must always be tribunals for their interpretation and enforcement.

In so far as the injunctive power of the courts is concerned, organized labor should understand that it has not been discriminated against. Numberless men in other walks of life have been subjected to the operation of this judicial power without raising any outcry against the courts and the law. For example, in thousands of cases all over this country, the individual out in the rural districts has been enjoined from cutting disputed timber or otherwise trespassing on land in controversy. This simple exercise of the power of injunction involves the same principle that is invoked against the striker—namely, that he shall not settle his civil dispute with his neighbor by the use of force. In innumerable instances, this beneficent and practical remedy has been sought and granted to protect the rights of the weak from the invasion of the powerful. It has been as readily extended to the protection of organized labor as it has to unorganized labor or property rights.

The right of laboring men to organize and to bargain collectively for advantageous wages and working conditions cannot be seriously questioned. It is declared by Congress and recognized and decreed by the courts. It does not follow, however, that this right may be exercised and enforced without regard to the rights of others and without any restraint in the interest of the common good.

Indeed, the big problem of organized labor today is identical with that of organized capital, and that is, how to avoid the abuse of great power. And it may well be remembered that a despotism of the many may be as detestable as a despotism of the individual.

In my judgment, it will be a long time before any serious attention will be accorded to the idea that organizations of either labor or capital shall be given legislative sanction for the use of violence and crime in the accomplishment of their purposes and that the courts shall be shackled and silenced in the presence of insolent and triumphant force.

The other proposal is that the Federal Courts shall be deprived of the power to pass final judgment upon the constitutionality of acts of Congress, and that Congress itself shall be empowered to pass upon the constitutionality of its own enactments. Of course, it necessarily follows that if such a change should be wrought in our National Constitution, an analogous one in each state constitution would be plausibly advocated. It is quite obvious that this is the quickest and surest method conceivable of changing our entire form of government, aside from straightout revolution. It would give Congress the power to speedily wipe out the written Constitution, and establish a new form of government in which Congress would be a law unto itself. This is the most revolutionary proposal that has ever been seriously put forward in the history of our republic.

It is a truism that our Government is a system of checks and balances, delicately adjusted to permit the action and reaction of the competitive forces of public sentiment. Our forefathers who perfected this admirable governmental machinery thoroughly understood the danger of self-destruction inherent in popular government. The same written Constitution which established the legislative branch of the Government for the expression of the popular will and the executive department for its execution, likewise set up the Judiciary to protect the Executive and the Congress each from the encroachment of the other, and to safeguard the people against the possible oppression of both. For the consummation of this great charter of freedom, Hamilton, Madison, Franklin, Jay, Washington, and their compatriots, sought counsel from the wisdom of every nation, in every age and clime. No man can read the Federalist without feeling a sense of awe and reverence for the super-statesmen and exalted patriots who penned this masterpiece and the Constitution it expounds and defends.

And yet there are men in our country today who seem to think that the drafting of our Federal Constitution required no greater expenditure of time, effort and intellect than is necessary for the publication of one issue of a "yellow" newspaper. They blatantly denounce the Judiciary and threaten to make it subservient to the kaleidoscopic changes in public sentiment reflected in successive Congresses. Under such a system, it might occasionally happen that the boll weevil, the army worm, the Hessian fly, and the grasshopper would set aside the National Constitution, for a combination of such insectivorous pests will now and then elect a congress. On any fine November morning, a concatenation of annoyances might generate the political bacteria in the popular stomach that would set up the grouch which would kick over the Constitution.

Another doctrine to which the leadership and the publications of the railroad labor organizations are largely committed is the Plumb plan of railroad operation, which is Government ownership, with private operation in which 'the employees shall participate managerially and share the profits financially. If there should be losses instead of profits, the owners—that is, the people—would dig up taxes to pay the deficit. Whether the experience of other countries, such, for example, as Italy, which is just now trying to unload government operation, will serve to modify the views of the advocates of similar schemes in this country, remains to be seen. I mention the matter of government ownership of railways, not for the purpose of discussing it now, but to use it as a key to the explanation of certain other conditions existent among railway employees. One of these is the prevailing unrest among nearly all classes of railway employees and their pronounced antagonism to the railroads for which they work. A large portion of the employees' magazines which pass over my desk contain bitter attacks on the railroads, their managements and their policies. These criticisms are not confined to matters of direct controversy between the railways and the employees, but they cover every ground of attack that might be made by those outside of railroad employment. Nothing is left unsaid that seems to be calculated to stir up hatred among the employees and

distrust and hostility among the people. It is quite remarkable to see the employees of an industry waging war upon that industry with the unquestioned purpose of destroying it. That this policy reacts detrimentally to the morale of the employees and detracts from successful operation, is beyond dispute. It has its origin in the fact that the leaders of the employees are conducting a political campaign for Government ownership, which is ofttimes inconsistent with their loyalty to the carriers.

This fact, coupled with one other, also accounts for the strenuous opposition of many of the employees to the Transportation Act, 1920, and the Railroad Labor Board. They feel that the successful adjustment of wages and working conditions and the gradual but certain reduction of freight rates under that statute will conduce to the postponement or prevention of Government ownership of the roads.

A remarkably frank statement of this attitude is printed in display type in the Brotherhood of Locomotive Engineers' Journal for November. The salient paragraphs read as follows:

> Let us face the railroad problem honestly. We shall continue to have freight tie-ups, labor trouble, inefficient service, over-valuation, and "inside" contract scandals so long as the railroads of this country are operated for private profit and not primarily for public service. The railroads, like the dirt roads, must belong to the people. The workers themselves possess the technical brains, devotion to duty, and loyalty to the public weal requisite for the efficient operation of the railways. Give them a change. The Plumb plan shows the way.
>
> Must the railway employes and the people of the United States suffer another railroad strike, perhaps far more serious than the last, in order to impress this truth upon them? The Plumb plan is our only hope. Either that, or chaos!

Whether this statement is a mere opinionative prediction of probable developments in connection with railway operation, or whether it is a covert threat that strikes of increasing seriousness will be superinduced unless and until the employees are given a chance to try their hands at managing the roads, you may draw your own inference. In either aspect of the matter, it is a deliberate and illuminating declaration of the state of mind of those in charge of one of the strongest transportation brotherhoods.

It would appear that there are four general methods, with numerous variations, of dealing with the labor situation in the railway industry:

First, the old method of permitting the carriers and their employees the unrestricted privilege of fighting out their differences.

Second, the method now in existence, under the Transportation Act, 1920, providing for the adjudication of such controversies, but leaving the parties free to ignore the results of the adjudication.

Third, the present method with the addition of a provision making the decisions on railway labor controversies by a competent tribunal enforceable.

Fourth, Government ownership, either with Government operation or with private operation as proposed by the Plumb plan.

Speaking of the last of these first, it cannot be given serious consideration as an immediate remedy for labor troubles and strikes or any of the other ills of the railway industry, for the simple reason that it is not going to be adopted at any early date, because public sentiment is now overwhelmingly against it. Even if it should be adopted, it is not proposed by the advocates of the Plumb plan that it should contain any direct inhibition against strikes. The belief that it would prevent strikes is apparently predicated on the idea that it would result in such a complete satisfaction of all labor demands that there would be nothing left to strike about. This would be true only in case the income of the railroads should be sufficient to meet every possible demand of labor, or, failing to meet them, that the public would cheerfully make up the shortage either by taxation or by increased freight and passenger rates.

Reverting to the first proposition—that of restoring the old condition of free-for-all fighting between carriers and employees with the public massacred on the side lines—nearly everybody in this day and time knows too much to advocate that. Of course, there are some spokesmen of organized labor and of the railroads who urge a return to the good old days when the representatives of the employees and of the carriers put their feet under the same table and negotiated with no outside pressure brought to bear upon them other than the sweet and gentle influences of conciliation. This lament overlooks the fact that the Transportation Act not only permits such negotiation between the carrier and the employees, but expressly commands it. Formerly, either party could decline to confer with the other, but the sacred privilege of touching toes under the managerial mahogany is now a legal guaranty. The real trouble does not lie in getting the feet under the table, but in preventing either one of the parties from putting his feet on top of the table.

As to conciliation, whenever either party to an industrial struggle is sufficiently anxious to take something away from the other and knows that he possesses the absolute power to do it, he takes it. This has been demonstrated a thousand times. Naturally, many cases occur in which the party wanting something does not want it and need it badly enough to justify fighting for it. Such disputes under the present law or any other will be peacefully adjusted by the wanter accepting less than his demand or even nothing at all. If these were the only controversies that arose, then conciliation would be one grand sweet song, as described by Secretary Davis. Perhaps some of you may recall the little incident of the Adamson Law, wherein conciliation, moral suasion, and tearful entreaty, all fell like birdshot on a dreadnaught.

There is only one sensible American method for the adjustment of labor controversies in the railway industry—and I am not speaking of any other—and that is by adjudication by an impartial tribunal. Labor condemned this plan before it had been authorized by law, and has fought it ever since. This opposition has been predicated on the fear of any and everything that is designed in any degree to limit railroad labor's right to strike. Many conscientious labor leaders believe that labor cannot obtain its dues, unless it possesses the final right to engage in industrial war; others, not so conscientious, see in this law only a possible lessening of the necessity for organization and the consequent diminution of their own power and importance. This view, in my judgment, is correct only to the extent that the cost to the workers of maintaining organization should, under the Transportation Act, gradually diminish, but the essentiality of organization to the well-being of labor will not be lessened by the acceptance of adjudication as a substitute for force.

To my mind, the only debatable question in connection with this matter is that of whether the law should be left as it is, enforceable only by public sentiment, or whether it should contain strong, clear-cut

provisions forbidding its violation, either by the railroads or the employees. In this connection, it is but just to say that the decisions of the Railroad Labor Board have been violated and evaded far more frequently by railroads than they have by employees, though a large majority of the big railroads have shown a fine spirit of co-operation with the Labor Board.

Without entering into an elaborate discussion of this question, it has never seemed to me that it involves the legal and practical difficulties alleged against it. The people of the United States have the legal and moral right to efficient and uninterrupted railway transportation—the most essential of all industries. Its public nature and the corporate powers given it by the people are the basis of the legal right. Its absolute indispensability to the very life of the Nation and to the well-being of each individual citizen is the basis of the natural, moral right. It matters not what rights individuals or groups may have, they must be subordinated to the supreme rights of the public. The people of this country cannot and will not submit to the throttling of railway transportation by owners, employees, or anybody else.

This right of the public is held in trust by the management and the men. The proper sense of honor will dictate to both the faithful execution of this trust. For the efficient discharge of this obligation, the men whose money is invested and the men whose brain and brawn are devoted to the industry must both be fairly and adequately compensated. The people must be the grateful and impartial friends of both parties, and must, without fear or favor, hold both equally responsible for the successful performance of this indispensable public service. As the cost of transportation enters into the price of all food, fuel, clothing, and shelter, it must be furnished to the people at the lowest cost consistent with the just and reasonable compensation of the capital and labor engaged in it. Railroad capital should not be permitted to gouge and oppress the people, nor should the public begrudge to it the reasonable reward of its service. Railroad labor should be paid a just and reasonable wage, and the public should not be unmindful of the skill, hazard and responsibility of the men into whose hands are committed the enormous wealth of its production and the lives of its traveling millions. The section foreman and the trackman who maintain the roadbed, the machinist who makes fit the locomotive and the cars, the telegrapher and dispatcher whose accuracy must be 100 per cent, the switchman who untangles the great yards at the constant risk of his life, and the engineer and fireman, and the conductor and trainman, to whose fidelity you intrust yourself asleep in the dead hours of the night—all of these men and others in railroad employment carry a great responsibility to a great number of people. Because of the magnitude of this responsibility, the men who discharge it should be more than average men, and in order that the carriers may get such men and hold them, their wages and working conditions should be commensurate with the responsibility, skill and hazard required. The consequent stabilization of railroad labor would be of vast benefit to the public.

On the other hand, railroad labor should remember that every cent of its remuneration must come out of the pockets of the people, the ultimate consumers, a majority of whom are not rich and most of whom are laboring with their hands or heads. The aggregate of railroad wages must not so far exceed the point of justness and reasonableness as to become a crushing burden to the people at large.

If the carriers and the men cannot agree upon wages and rules that are fair to both and not burdensome to the public, then the people through some fairly constituted constituted tribunal should settle the disagreement, and both the parties should trust the representatives of the people to do the square thing. The results of such a system would average higher in economic justice than would the results of industrial warfare, and the cost would be incomparably less.

There would be no involuntary servitude in such a system. Entrance into railway employment would be voluntary, and exit from it would be equally voluntary. The choking of traffic by strikes is not the exercise of the natural right of men to leave the employment of the carrier. They are not endeavoring to leave the carriers' service, but are merly trying to enforce a demand by so-called economic pressure. As a matter of fact, the striking shopmen finally claimed that they had not left the service of the carriers, but were still employees.

It is said, however, that an anti-strike provision in the Transportation Act would be impracticable and unenforceable. This I do not believe. Railway employees would adapt themselves to this condition of the public service, and would not forcibly resist the law of the land. Very soon the rank and file would realize that the new condition was highly beneficial to themselves and their families. The people would regard them as valuable public servants, and the ballot box would stand as their ready protection against any possible injustice.

There are millions of men in this country who have not lost faith in the Government bequeathed to us by our fathers. It has had the strength and flexibility of fibre to withstand the shock of every storm. Its adaptability to the changing conditions of men and things has been the marvel of the world. To the conservative, it has given assurance; to the progressive, opportunity. Today there is no problem of society or industry that cannot be solved within the four corners of the American Constitution. The aspiration of labor for a fairer share in the product of its hands, to the end that the objects of its love and care may be lifted upon a higher plane of comfort and happiness, cannot be realized so fully under any other government. Capital, the offspring of labor and management, is permitted in this land to reach the perfection of service and the full measure of reward.

And yet there is fleating around the world today a fetid vapor from the rotting autocracies and festering radicalisms of Europe that has polluted and poisoned the lungs of many men even in the clear atmosphere of this republic.

There is no body of men in our Nation more capable of combating and confounding those who ignorantly or designedly spread the doctrines of class hatred and of disloyalty to our institutions than the American Bar. And the Bar of Illinois, situated in the very heat focus of the melting pot, has work to d along this line. What a splendid opportunity for service to your own posterity and to all mankind. Surely the front phalanx of our country's defenders will a ways be those men whose profession has taught them to understand our constitution, to cherish its traditions, and to thank Almighty God for the inspiration that guided the genius which fashioned it.

MEXICAN CORPORATION LAW

Discussion of Important Question Whether Non-Mexican Incorporators of a Mexican Corporation Must Waive Their Nationality in Certificate of Incorporation and Practical Suggestion to American Investors

By Lorenzo J. Roel
Of the Mexican Bar

BACK in the year 1916, Mr. Venustiano Carranza, under the picturesque title of First Chief of the Constitutionalist Army, had assumed the functions of the Executive and the Legislative Powers of the Republic of Mexico, and, as the leader of a triumphant Revolution, was the sole general *de facto* ruler of Mexico with dictatorial or so-called "pre-constitutional powers."

Vested with these powers, the First Chief of the Constitutional Army, through his Secretary of Justice, enacted two laws in the form of Circulars which bore respectively the Nos. 38 and 50 of the Department of Justice. These circulars, translated into English, provided as follows:

> A seal which reads: United Mexican States—Department of State and of the Office of Justice. Mexico,—*Circular No. 38.*
>
> The Citizen, First Chief of the Constitutionalist Army in charge of the Executive Power of the Republic has ordered that paragraph three of Circular 35 of this Department, dated June 17 last, be added to, in the sense that, in order to take into consideration and give course to the application for permits for the organization and registration of corporations (Sociedades Anonimas) in general and especially of those which have for their object the exploration and exploitation of oil-bearing lands, the following requisites must be complied with:
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> That a clause of the articles of incorporation must contain the waiver of the nationality of the foreign incorporators, for all the effects of the corporation; and that the certificates of stock to which reference is made in Article 178, of the Code of Commerce must bear the statement that the acquisition of the said certificates of stock necessarily imports the waiver of the nationality of the foreign acquirer, in his character of owner of the certificates.
>
> I communicate this to you for its compliance.
>
> Constitution and Reforms—Mexico, July 27, 1916—The Secretary of State and of the Office of Justice, R. Estrada.
>
> Department of Justice. A seal which reads: United Mexican States.—Department of State and of the Office of Justice—Mexico—Section of Notaries, Statistics, Library and Archives, *Circular No. 50.*
>
> For the purpose of simplifying, within the adopted criterion, the procedure relative to the registration of acts and contracts subject to this requisite, leaving to the care of the Registrar the application of clear and precise provisions in this respect, without the proceedings established up to this time, in the Second Section, of this Department; by order of the Citizen First Chief of the Constitutionalist Army, in charge of the Executive Power of the Republic, the following provisions shall be observed in the future:—
>
> IV. As to corporations in general, and oil corporations in particular, notaries are forbidden to authorize any articles of organization which are not in conformity with the two requisites provided by Circular No. 38; also under the penalties with which the violations of the Notarial Law are administratively punished.
>
> This circular, which repeals those issued under Nos. 15, 19, 35 and 38, shall commence to be in force from the date of its legal publication.
>
> I communicate this to you for its exact compliance.
>
> Constitution and Reforms,—Mexico—November 2, 1916—The Secretary of Justice, R. Estrada.

The aforesaid circulars, as well as all other provisions enacted during the pre-constitutional period which have not been repealed nor are in conflict with the Constitution of 1917, have been held by Mexico's highest court, the Supreme Court of the Nation, to be still in force.

Supreme Court's decision of Jan. 23, 1918 ("Amparo" Baights José) reads in part:

> Whereas: Although all the laws and provisions enacted during the pre-constitutional period in the Republic must be considered in force, so long as they are not repealed, this must be understood in so far as same are not in conflict with the Political Constitution, published the fifth of February, 1917, which is the Supreme Law of the Union . . .

Supreme Court's decision of April 4, 1919 ("Amparo" Gutiérrez Ricardo) reads in part:

> The Court has established the jurisprudence that the provisions of the pre-constitutional period are applicable and must be obeyed and complied with, in so far as they do not conflict with the Constitution.

On the other hand, Article 7 of the Civil Code, translated into English, reads:

> Article 7. Acts executed against the tenor of prohibitive laws, shall be null unless the said laws provide otherwise.

Therefore, failure to comply with prohibitive Section IV of Circular No. 50 necessarily entails the nullity of the articles of incorporation and, consequently, the non-existence of the corporation itself, and of all contracts made by it, inasmuch as the said Circular does not provide otherwise. The importance of knowing whether or not these circulars must be complied with is readily appreciated. A Mexican corporation may be organized ignoring these circulars. A corporation may then purchase undeveloped mines and oil properties, which, after a considerable investment, turn out to be of immense value. The original owners of the mines and oil properties may then use to advantage the flaw in the articles of organization of the corporation by demanding before the Courts the rescission of the contracts of sale on the ground that the corporation had no legal existence at the time of contracting, and in a country like Mexico, where there is no equity jurisdiction, the Court must order the contracts rescinded and the now immensely valuable properties returned to their original owners who may thus be enriched at the expense of the unfortunate corporation. A situation like this has already occurred in the famous Naica case, still pending in the Mexican courts, which arose out of the violation of other provisions of the Mexican Law concerning corporations.

The writer, in his professional practice, has had occasion to learn that the opinion of the Mexican Bar is divided on the important subject of whether or not Section IV of Circular No. 50 remained in force after the enactment of the new Mexican Constitution of 1917. He has in his possession opinions of prominent Mexican lawyers, who, giving their reasons therefor, maintain that this Circular has been repealed by the Mexican Constitution, and, consequently, non-Mexican incorporators do not need to waive their nationality in

the certificate of incorporation. He has also in his possession a letter from the Attorney General of Mexico, in which, without giving his reasons therefor, this high official expresses his opinion that said Sevtion IV of Circular No. 50 is still in force. As the writer concurs in the opinion of the Attorney General of Mexico, he will endeavor to state herein his reasons therefor, by quoting and rebutting the contrary views expressed by distinguished Mexican lawyers.

Lic. Miguel S. Macedo, one of the best known and most prominent attorneys of the Mexico City Bar, in an opinion rendered to Lic. Arturo H. Orcí, at the request of the present writer, states (as translated from the Spanish):

> On the other hand, I am of the opinion that Article 27 of the Constitution, by the provisions contained in fractions I and IV of its Seventh paragraph, repealed the provisions of Circular No. 50 relative to corporations, because it established rules contrary thereto.
>
> In fraction I, Mexican corporations are expressly authorized to acquire the dominion of lands and waters and to obtain concessions for the exploitation of mines, no waiver of nationality, of foreign incorporators or stockholders being required.
>
> In fraction IV, commercial corporations including "Sociedades Anonimas" (stock corporations) are forbidden to acquire, possess or administer agricultural estates, but the prohibition does not extend to mines and even concerning lands, the stock corporations organized to exploit the mining industry, are authorized to acquire, possess and administer lands, in the extension which may be necessary for their object. This fraction does not require any waiver of nationality.

Fractions I and IV of paragraph Seven of Article 27 of the Mexican Constitution, quoted by Lic. Macedo, in English translation, read as follows:

> The capacity to acquire the dominion of the lands and waters of the Nation shall be ruled by the following provisions:
>
> I. Only Mexicans by birth or by naturalization, or Mexican corporations, have a right to acquire dominion over lands, waters and their dependencies, or to obtain concessions for the exploitation of mines, water power or combustible material in the Republic of Mexico. The State, may concede the same right to foreigners, provided that they agree in the Department of Foreign Affairs to consider themselves as Mexicans in all that has to do with said properties and that they will not invoke the protection of their respective governments in matters relating to these properties; with the understanding that, in case they fail to comply with this agreement, they will lose their rights over the properties they may have acquired by virtue of said agreement, same passing again to the dominion of the Nation. Foreigners may not, under any conditions, acquire direct ownership of lands and waters which are within 100 kilometers of the land boundaries (National border line) or 50 kilometers of the coast line.
>
> IV. Commercial share corporations may not acquire, possess or administer rustic lands. The corporations of this class formed to exploit any manufacturing, mining or petroleum industry, or for any other purpose not agricultural, may acquire, possess or administer only the lands strictly necessary for the establishments or services of the objects indicated, and which the executive of the Union, or of the respective States, shall fix in each case.

It appears from the above quotations that, in reliance upon the fact that fractions I and IV of paragraph seven of Article 27 of the Constitution, *do not* contain the provisions of Circular No. 50 relative to corporations, Mr. Macedo draws the unsustainable conclusion that said Art. 27 "repealed the provisions relative to corporations of Circular No. 50 because it established rules contrary thereto." The unsoundness of this conclusion seems patent. There is nothing in the above quotations showing the least inconsistency between the provisions of Section IV of the Circular and those of fractions I and IV of paragraph seventh of Article 27 of the Constitution. Much less is there anything in the Constitutional provisions expressly repealing the provisions of the Circular. Lic. Macedo's conclusion that the silence of the Constitution on details which are the subject matter of secondary laws, implies the repeal of the latter, is so obviously unwarranted, that the writer would not even have considered it were it not for the very high standing of Mr. Macedo at the Mexican Bar.

Lic. Jorge Vera-Estañol, of Los Angeles, California, formerly a professor in the Law School of Mexico City, and who stands at the head of the Mexican legal profession, is quoted by Mr. Malcolm C. Little, an attorney of Nogales, Arizona, in a letter which was received by and is in possession of the writer, as follows (translation from the Spanish):

> From the point of view of Constitutional Law, foreigners are not subject to other limitations than those established in Article 27 of the Constitution of 1917, which does not require of them any waiver of citizenship, except in case of the acquisition of real estate in the Republic of Mexico. Such limitation is not applicable, therefore, to the organization of Mexican companies and subscription to their capital stock.
>
> The circulars to which you refer, therefore, ceased to be effective as Laws upon the adoption of the Constitution of 1917.

To begin with, Mr. Vera-Estañol is wrong in asserting that, from the point of view of Constitutional Law, foreigners are not subject to other limitations than those established in Article 27 of the Constitution of 1917, for they are also subject to the limitations established in Article 33 of the Constitution, which reads (translation from the Spanish):

> Article 33. Foreigners are those who do not possess the qualities named in Article 30. They are entitled to the guarantees which the first section of title I of this Constitution accords; but the Executive of the Union shall have the exclusive power to force any foreigner whose presence is judged inconvenient, to leave the National territory immediately and without the necessity of a previous trial. Foreigners may in no case take part in the political affairs of the country.

But foreigners in Mexico should not be considered only from the point of view of the Constitutional Law inasmuch as they are not only subject to the Constitution, but to all other Federal Laws as well. Article 32 of the Ley de Extranjería (Law of Foreigners), in force since 1886, reads:

> Only the Federal Law may modify and restrict the civil rights enjoyed by foreigners by the principle of international reciprocity, so that they may thus be subject in the Republic to the same incapacities imposed by the laws of their country upon Mexicans residing therein. Consequently, the provisions of the Civil Code and of the Code of Civil Procedure of the Federal District have the character of Federal Laws in this respect and shall be obligatory all over the Union.

Foreigners are, therefore, subject to Section IV of Circular No. 50, which in my opinion constitutes an addition to Articles 95, and 175 of the Federal Code of Commerce of 1889. This Code contains in one of its titles what might be called the corporation law of Mexico. Its aforesaid Articles 95 and 175 give an enumeration of the requisites which the articles of organization must have in order to be valid.

Like Mr. Macedo, Mr. Vera-Estañol takes the position that because Article 27 of the Constitution did not repeat the provisions of the Circulars, said Circulars ceased to be effective as laws upon the adoption of the Constitution. The writer trusts that the explanation given hereinabove when discussing Mr. Macedo's views, will suffice to make evident the unsoundness of Mr. Vera-Estañol's assertion.

Lic. Enrique M. Sobral, a very distinguished member of the Mexican Bar, in a letter addressed to the

writer, makes the following remarks in relation to the Circulars under discussion:

> First. The Circulars issued by the Secretaría de Justicia (Department of Justice) never were Constitutional. Strictly speaking, when these Circulars were enacted, the Constitution of 1857 was in full force and undoubtedly Mr. Carranza had no faculties under said Constitution to issue the Circulars, because they were in opposition to the letter and spirit of the 1857 Constitution.

The writer entirely agrees with Lic. Sobral that Mr. Carranza had no powers, under the Constitution of 1857, to issue the Circulars. But Mexico was then passing through the so-called pre-constitutional period and Mr. Carranza, as the leader of a victorious revolution and of the recognized general *de facto* government of Mexico, had dictatorial powers to issue said Circulars.

Lic. Sobral further says:

> Second. Even if Mr. Carranza had power to legislate during the pre-constitutional period, he had to do it in the proper way. He could not for instance, abrogate the Civil Code by a verbal resolution; he could not abrogate it by means of a letter, nor could he do it by way of a Circular. This means that the acts of the First Chief had to be considered according to their external form. If he issued laws, these were laws, but when he issued circulars, those were only executive orders and cannot be considered as laws.

In the above statement Mr. Sobral seems to give undue importance to the designation "Circulars," as if the substance of the provisions in question depended entirely upon the name which the Executive, acting dictatorially in the name of the Legislative Power chose to give them. But the said circulars, regardless of their name, are actually nothing less than an amendment of Articles 95 and 175 of the Code of Commerce, a Federal Law, which, in these sections provides the requirements which the articles of a corporation must contain in order to be valid. Accordingly, to the previously existing requirements must now be added the waiver of the nationality of foreign incorporators as provided by Circular No. 50.

Under the Constitution of 1857, this amendment to a Federal Law could only have been made by the Federal Congress; but as has been said before, Mexico was at the time ruled by an actual dictator who had repudiated the Constitution of 1857. This dictator exercised undoubtedly dictatorial or "pre-constitutional" powers to amend Federal Laws and to give the amendments the name of "Circulars" or any other name which he might see fit. The writer agrees with Lic. Sobral in that the dictatorial executive who issued these Circulars could have repealed them during the pre-constitution period if he had seen fit to do so. But he did not do so, and accordingly, when the dictatorial powers of the Executive ceased on May 1, 1917, with the enactment of the new Constitution, what the Executive had enacted during the pre-constitutional period, assuming the powers of Congress, he could not thereafter repeal by his personal fiat.

Lic. Sobral further says:

> Fourth. The circulars deprive the foreigners of the right of freely incorporating Mexican corporations. It is true that the law can subject the incorporation of a company to as many requisites as it deems advisable within the Constitution, but the law has no power to establish discriminations between the natives and foreigners in this or any other matter, especially when such discriminations are not contained in the Constitution. The reason is that the guarantees granted by the Constitution apply to all men irrespective of their nationality and, therefore, where the Constitution does not discriminate, the law cannot discriminate either without violating the guarantees.

In the writer's opinion, the Circulars do not discriminate between natives and foreigners any more than, for example, does Article 6 of the Commercial Code. This Article requires that those over 18 and under 21 years of age must be emancipated, qualified or especially authorized before they may engage in commerce; nevertheless, this provision does not discriminate illegally between these minors and persons of legal age. If the Circulars do not require natives to waive their foreign nationality, it is simply because said natives have no foreign nationality to waive. The purpose of the circulars is to place foreigners and Mexicans on the same footing; and this purpose is not contrary to the Constitution. It is the writer's opinion, therefore, that the requisites to which the circulars subject the incorporation of a company fall among those which, to use Lic. Sobral's words, "the law must deem advisable under the Constitution."

Lic. Sobral further says:

> Fifth. There is a great difference between the requirements of the Code of Commerce and the requirements of the Circulars. The first apply to all and every one, while the second have an exceptional character, and as you know, exceptions must be strictly applied and cannot be created except by the authority that enacted the law. In this case, that authority is the Constitutional power, and nobody but itself can increase the exceptions contained in its work, namely in the Constitution.

If Lic. Sobral's argument under paragraph Sixth is correct, then Article 6 of the Code of Commerce above referred to is also unconstitutional. It discriminates between men over 18 and under 21 years of age and the older men. The discrimination is not in the Constitution, and it violates Article 4 of the supreme law of the land which guarantees the unhindered freedom to engage in any honest and useful occupation. If no constitutional provision was necessary to establish this exception, the writer sees no reason why a constitutional provision should be necessary in order to establish the exception provided by the amendments to the Code of Commerce contained in the Circulars. In this paragraph, Lic. Sobral seems to intimate that all requirements which do not apply to all and sundry, can only be created by the Constitution. The writer entirely disagrees with this. There are many requisites in the Civil Code and other laws which apply only to special classes—women, minors, foreigners, etc. The following is a very appropriate instance. Neither the present Constitution nor the Constitution of 1857 forbid foreigners to lease properties along the borders. Yet, the Law of Foreigners of 1886 establishes the exception, not contained in the Constitution, of forbidding foreigners to lease this kind of property for more than ten years, and the constitutionality of this exception has never been challenged in the Mexican Courts.

Lic. Sobral finally states:

> Sixth. The question is not whether the right of applying to a foreign government is one of the so-called "Derechos del Hombre" (Rights of Man) or not. The true question is to decide whether the right of association without any interference of the Executive branch of the government, and in the same terms granted to the Mexican, is the right given by the Constitution to every free man, and therefore whether said right is a "Derecho del Hombre" (Right of Man). Undoubtedly it is, and therefore, a governmental resolution, which subjects the exercise of said right to certain exceptional requirements not contained in the Constitution, is in violation of the rights of free association granted by the Constitution. Suppose that the government issues a circular saying that no Mexican can associate without declaring previously that

he will never kill a man. This circular would be absolutely unconstitutional, notwithstanding the fact that nobody has the right to kill a man, and therefore, the respecting of somebody else's life is not in itself a violation of any "Right of Man," but it creates a condition and limitation of rights that does not exist in the Constitution, and that is why it would be unconstitutional.

Lic. Sobral admits in paragraph fourth quoted hereinabove, that "it is true that the law can subject the incorporators of a company to as many requisites as it deems advisable within the Constitution." The question, therefore, hinges on this: whether or not the requisites contained in the Circulars are of that character which the law would deem advisable under the Constitution. In the writer's opinion they are, for the reasons above stated. On the other hand, the writer would not consider advisable the suppositious requisite mentioned by Lic. Sobral of demanding from all Mexican incorporators the previous declaration that they will never kill a man.

In conclusion, the writer deems it convenient to quote herein in full, the letter mentioned above as having been received by him from the Attorney General of Mexico, from which it may be seen that this official of the Mexican government is of the opinion that Paragraph IV of Circular No. 50 is still in force, notwithstanding the enactment of the Constitution of 1917. The said letter, translated into English, reads as follows:

Federal Executive Power
Mexico
Office of the Attorney General of the Nation
Subject Matter:

Department of
Section: Consulting
Table: First
No. 15345.

To Citizen Lic. Lorenzo J. Roel,
24 Broad Street,
New York, N. Y., U. S. A.

In reply to your writing, which you addressed to this Office, in which you ask whether or not Paragraph IV of Circular No. 50 of the Department of Justice, published in the Diario Official of November 2, 1916, has ceased to be in force since the adoption of the Constitution of 1917, I beg to advise you that, although it is not within the powers of this Office to decide the question to which reference is made in your said official communication, in the opinion of this Office the said Paragraph IV of said Circular No. 50 is still in force.

I reiterate to you my attentive consideration.

Actual Suffrage.
No Reelection.
Mexico City, June 6, 1922.
The Attorney General of the Republic.
(Signed) E. Neri.

Before closing this discussion it is pertinent to ask, What is the effect of the waiver of diplomatic protection required by Circular No. 50 from the point of view of International Law?

The states of Latin America, based on the principle known as the Calvo Doctrine, contend that the waiver of diplomatic protection is internationally valid; but among the other states of the world the contrary view prevails predicated upon the theory that an alien may waive his right to be protected, but he cannot waive the right of his own sovereign state to protect him. Actual contractual waivers have been denied effect by Great Britain, Germany and the United States.

Mr. Rodgers, special representative of the American Government in Mexico, telegraphed on August 10, 1916, to Mr. Lansing, Secretary of State, as follows:[1]

Mexico City, Mexico, August 10, 1916.
Secretary of State, Washington, D. C.

Order to notaries provides that in formation new corporations and particularly those for exploration and exploitation of oil lands, charter shall contain clause providing that foreign stockholders renounce their national rights as to company affairs, this meaning they waive all right to protection interest through their national representatives. Informed that this has been tried before, but failed and is not considered to have legal effect. Nevertheless it is undoubtedly dangerous and presumably contrary to treaty rights. Have filed general protest.
Rogers.

To which Mr. Lansing replied:[2]

Department of State,
Washington, D. C., August 16, 1916.

Rodgers,
Special representative American Government, Mexico City:

295. The department refers to your telegram No. 278, and instructs you to advise the proper authorities that decree providing that new corporations are obliged to state in their articles of incorporation the clause of renunciation by foreign stockholders of their national rights as to company affairs will not be regarded by the American Government as annulling the relations existing between itself and the citizens who may own stock in such corporations or as extinguishing its obligations to protect them in case of denial of justice.
Lansing.

Mr. Bayard, Secretary of State, in his communication to Mr. Hill, February 16, 1887, For. Rel. 1887, p. 100, expressly stated:

No agreement by a citizen to surrender the right to call on his government for protection is valid either in international or municipal law.[3]

Practical conclusion: Granting that it is a moot question whether or not Circular No. 50 is still in force, American incorporators should comply with the provisions of the said Circular by waiving their right to diplomatic protection in the articles of incorporation.

1st.—Because in so doing their right to diplomatic protection is not impaired inasmuch as their waiver is not held internationally valid by the most powerful states, their own included; and,

2nd.—Because the Mexican courts, in pursuance of their duty to apply the Mexican laws, may adjudge invalid a Mexican corporation whose articles of incorporation and by-laws do not contain the waiver in question and, in the face of such adjudication, diplomatic representation may afford no relief, with consequent loss and inconvenience to the foreign stockholders.

1 and 2. *Hearing* before a Sub-committee on Foreign Relations, U. S. Senate, pursuant to S. Res. 106, 106 (1920), part 21, pp. 3171-3172.

3. For further precedents see Borchard's *Diplomatic Protection of Citizens abroad*, pp. 797 and 798.

Public Service and Personal Sacrifice

"The appointment of Judge C. J. Fisk to the state bar board is one that will meet with favor in every section of the state. The years of experience on the district and supreme court bench followed by active practice, have equipped the Minot attorney for ideal service on the bar board. The functions of the bar board are such as to entitle it to the soundest judgment available.

"In this connection the public should realize that the acceptance of a place on the bar board, or any similar post, is a direct sacrifice by any successful practitioner. The per diem will hardly pay the actual expenses incurred, to say nothing of the work involved. The lawyer, surgeon or other professional man of ability who will give the necessary time to such work is entitled to the thanks of the public. For unless men of ability and integrity are willing to accept these posts the quack and demagogue will continue in control and the standard of requirements will soon be demoralized."—*From Minot (N. D.) News.*

SOME AMERICAN CAUSES CELEBRES

III. THE McGANNON CASES AT CLEVELAND

By E. A. FEAZEL
Librarian, Cleveland Law Library Association

ON the evening of May 5, 1920, in the city of Cleveland, two men started out on a joy ride which was destined to bring tragic results to themselves and have far-reaching influence upon the administration of criminal justice in that city. One of these men was William H. McGannon, at that time Chief Justice of the Municipal Court of Cleveland, the other Harold Kagy, an auto mechanic and garage man who had been taking care of the Judge's car.

It was the writer's fortune to have known McGannon somewhat intimately, having been a classmate of his at Western Reserve University Law School for nearly two years, and a member of the same boarding club during one of those years. He was a large man, both physically and mentally, but governed by passions and habits which he at that time made little effort to control, and which eventually proved his undoing.

For two years, though spending most of the nights in the pursuit of pleasure, he managed to pass the necessary examinations and was considered a star player upon the University foot-ball team; but in the third year the pace became too fast for him and he was not permitted to finish his course at the Law School. He then entered a law office and was admitted to the practice of law, but soon became so addicted to the liquor habit that he accomplished little as a practitioner.

Eventually a former common pleas judge, who had himself been a victim of the liquor habit, interested himself in McGannon and succeeded also in interesting the late Tom L. Johnson, then mayor of the city, and upon McGannon's promise to get on the water wagon and stay there, the latter caused him to be appointed assistant prosecuting attorney.

During the succeeding years McGannon not only stayed sober but made an excellent record as Assistant Prosecuting Attorney, and when the Municipal Court of Cleveland was created in 1911 he was elected the first Chief Justice of that court. He made an excellent record as a judicial officer and at the expiration of his first and second terms he was endorsed for re-election by newspapers and civic organizations in general and twice re-elected by large majorities.

Such was the man who in the spring of 1920, after rising to a position of honor and influence in the community and in his profession during twelve years of abstinence, again became addicted to the flowing bowl and started out to spend the evening with his friend Kagy.

After driving for some distance about the city and its environs they stopped at a saloon in the Italian quarter of the east end at about eleven o'clock, and there fell in with one John Joyce, a professional police court bondsman and a proprietor of a speakeasy. The three, after spending some time at the saloon mentioned, started downtown about midnight in the Judge's car, passing close to his home. The evidence is conflicting as to the condition of the Judge at this time, but all agree that Joyce was very drunk.

The car arrived at the corner of Hamilton Ave. and E. 9th Street in the downtown section between twelve and one A. M., where Kagy was shot in the back. When police and others in the vicinity reached him he stated that he had been shot by John Joyce as he was getting into the car after having helped Joyce to alight. Later he was taken to a hospital where he died. Shortly before his death he again reiterated his statement that Joyce had shot him.

The newspapers, on the day following the shooting, devoted much space to the affair and stated that it was reported that "A Judge of the Municipal Court" had been with Kagy earlier in the evening; also that a mysterious "Third Man," "a very large man," had been seen running from the scene of the shooting. For days it continued to refer to this "Mysterious Third Man" so that the query "Who was the Third Man?" became a standing joke in the community.

Following Kagy's death Joyce was arrested and in due time indicted and charged with second-degree murder. Joyce at this time found himself in a dangerous situation. Knowing of the statement which Kagy had made, and which he knew would be offered as evidence against him at his trial, he proceeded to meet the situation by employing one of the best criminal lawyers in the city to defend him and providing for a number of witnesses to aid him in his defense. At his trial some of these witnesses swore they saw a large man, dressed as McGannon was admittedly dressed, at the scene of the crime, others that they saw such a man running from the scene of the crime. Joyce himself testified that he was so drunk when he was helped from the car that he did not know what was happening; that he went from the scene of the shooting to his saloon, and down into a sub-cellar where he slept until the next day, when he learned for the first time through the newspapers that Kagy had been shot. McGannon, called as a witness at the trial, testified that he had left the automobile at Euclid Avenue and E. 9th Street and walked on E. 9th Street to Superior and thence along Superior to the Public Square, where he boarded a Euclid Avenue street car and went home.

The State failed to have Kagy's declaration that Joyce shot him admitted as a dying declaration because of its inability to show that Kagy realized that he was dying or about to die. Without this declaration and without any witness who saw Joyce fire the shot, and with the evidence of a number of witnesses raising more than a suspicion that the "Mysterious Third Man" was the one who did the shooting, the jury promptly acquitted Joyce.

Suspicion which had before been directed toward McGannon was strengthened by the evidence at the Joyce trial.

The case was again taken before the Grand Jury and McGannon indicted for the crime of which Joyce

*Paper read before the meeting of the Association of Law Librarians at Detroit, Mich., June 27, 1922.

had been acquitted. McGannon, now realizing his danger, prepared to meet the issue by retaining another of the best criminal lawyers in the city to defend him and providing himself with at least a dozen alibi witnesses who swore that they saw him walking on East 9th Street and Superior Avenue at the exact time the shooting was occurring, two or three blocks from there.

However, the State at McGannon's trial, in addition to the witnesses who had appeared at the Joyce trial, had one or two other witnesses who swore positively that they saw McGannon on the spot and saw him running away, and as a star witness produced one, May Neely, who testified that she saw McGannon fire the shot, put something shiny into his pocket and run from the spot. Miss Neely, according to the story she told upon the witness stand, had been an affinity of the Judge's for some fifteen years and on this night had been looking for him and had trailed him downtown, presumably to prevent him from falling under the spell of a certain manicurist, who, she feared, was exerting an evil influence over him. This trial lasted two weeks, and it is safe to say that no other trial has ever occurred in Cleveland which aroused such general public interest. The court room was packed at every session and hundreds were turned away each day. The newspapers devoted much of their front pages every day to recounting the happenings of the day at the trial. The trial resulted in a disagreement, the jury standing ten for conviction and two for acquittal.

At the next term of court this case was again brought to trial, the State depending upon the same witnesses as in the former trial, and McGannon upon the same alibi witnessess with a few new ones.

At the second trial, however, when Miss Neely was placed upon the stand she refused to answer any questions, whispering her reason for such refusal to the trial judge, and he sustained her in her refusal to answer. Without the evidence of this star witness the State's case was materially weaker than at the first trial, while the defense with the greater number of alibi witnesses was strengthened, and the jury acquitted McGannon and he was discharged from custody.

The three trials and the prominence of one of the men accused, had aroused the greatest public interest in the case and the result of the trials, the acquittal of both of th men who had admittedly been in the company of e deceased, was such a palpable miscarriage of justice that popular indignation was aroused to a greater extent than any other dozen criminal cases could ever have aroused it. It was perfectly apparent to everyone who had given even the most casual consideration to these cases, that much of the evidence offered in all of the trials was perjured. The newspapers and civic organizations demanded that action be taken against witnesses who had appeared at these trials. The local Bar Association appointed a special committee to aid in the matter and assigned a special counsel to aid the county prosecutor in securing indictments and prosecuting those indicted.

The result of a thorough investigation was the indictment of McGannon and about a dozen of the witnesses who testified for and against him, for perjury. Up to the present time McGannon and four of the witnesses have been brought to trial for perjury or subornation of perjury, convicted and sentenced to the penitentiary. The greatest interest, of course, centered in the trial of McGannon. At this trial Miss Neely again appeared as a witness for the State and told of a meeting with the Judge intervening between his first and second trials, arranged by two newspaper reporters, wherein it was arranged that she should not be a witness against him at his second trial, and the plan, which she followed successfully at the second trial, was worked out. She also testified that her testimony given at the first murder trial was true. After McGannon's conviction for perjury, he carried the case to the Court of Appeals and to the Supreme Court of the State, where his conviction was affirmed. On the first of June, 1922, he began serving his sentence in the Ohio penitentiary.

The result of these numerous trials for murder and perjury, growing out of the killing of Kagy, brought home to the people in general the weakness of the administration of criminal justice in our large cities and resulted in the Cleveland Foundation making a thorough investigation of this subject. They placed this survey under the direct charge and supervision of Dean Roscoe Pound and Professor Felix Frankfurter of Harvard Law School. These gentlemen selected investigators from different parts of the country to make exhaustive examinations of the administration of the police department, of the city and county prosecutor's offices, the working of the criminal courts both municipal and common pleas, and various other subjects dealing with the administration of criminal justice.

After an exhaustive survey of these subjects, the results were given to the public in a series of reports, the first, "Police Administration," by Raymond B. Fosdick; the second, "Prosecution," by Alfred Bettman and Howard F. Burns; the third, "The Criminal Courts," by Reginald Heber Smith and Herbert B. Ehrmann; the fourth, "Correctional and Penal Treatment," by Burdett G. Lewis; the fifth, "Medical Science and Criminal Justice," by Herman M. Adler; the sixth, "Legal Education in Cleveland," by Albert M. Kales; the seventh, "Newspapers and Criminal Justice," by M. K. Wisehart; the eighth, "Criminal Justice and the American City—A Summary," by Roscoe Pound. These reports were afterwards bound as one volume making a substantial volume of 729 pages.

The results of these various trials and the report of the result of the Survey by the Cleveland Foundation has been very beneficial and there has been a decided speeding up and toning up in the administration of criminal justice in Cleveland. They have likewise resulted in the organization of a society to aid in the administration of criminal justice. This society is supported by civic organizations and public spirited individuals and has a paid corps of workers who see that the results thus far attained are not lost through public indifference.

Probably some one will ask "Who really did shoot Kagy?" That is a question that has not as yet been answered. The theory and belief of those who conducted the state's case in the prosecution of Joyce and at the first trial of McGannon, is that McGannon fired the shot. Their theory was that it had been customary, when the Judge and Kagy were out together on occasions like the one we have described, for Kagy to look after his friend when he became incapacitated and in that line of duty to take charge of his money and valuables; that he had done so on this occasion and that the judge, after demanding their return and not receiving them, being under the influence of liquor

and having a very violent temper, had fired the shot; and that Kagy, to protect his friend and patron, whom he knew to be not responsible for what he was doing, had endeavored to shield him by stating to the police that Joyce fired the shot.

It has likewise been the belief of many that Kagy's statement made to the police was true, but that McGannon, being upon the spot and not being too drunk to realize that the notoriety growing out of the affair would not enhance his reputation in the community, instead of staying and assisting his friend who was wounded, had hastened from the scene of the shooting and then, by procuring perjured evidence, had attempted to prove an alibi to meet like perjured evidence which Joyce had procured to throw suspicion upon him.

As to which of these theories is correct one guess is entitled to as much weight as another, and, unless some death-bed confession shall at some time in the future clear up the mystery, it may be necessary to accept the explanation offered after the acquittal of both McGannon and Joyce, that as only three men were present at the scene of the shooting and two of these have been found not guilty of the crime, it must necessarily follow that the third, Kagy, committed suicide by shooting himself in the back.

WANTED: A LAWYER'S PHRASE FOR LEGAL CAPABILITIES AND CONSTRAINTS

By ALBERT KOCOUREK

Editor of Illinois Law Review and Professor of Law in Northwestern University

IT is an obvious thing to say that words cost countless sums. What a man says may run into thousands or millions, as it is a slander or a promise. A calculation made in New York some time ago showed that Wills is the prime favorite of litigation. Many of these cases are merely about words—either the words of a legislator or the words of a testator. Perhaps, in the last analysis, all legal disputes are reducible to disputes about words, but there can be no doubt that a large part of litigation is about formal words and generally the words of a public text such as a constitution, a statute, or an ordinance or the words of a private text such as a deed, a will, or a contract.

Whether wisely or not, the law abhors definitions. The very subject matter of law, its concepts, is designedly left vague and elastic. This practice would be regarded as intolerable in any other art or science. A mechanic calls a spade a spade and not on occasion a monkey-wrench or a screwdriver. A lawyer, on the other hand, dealing with more subtle tools, will not hesitate to call a release, a contract, or a duty to refrain from trespass an obligation. This is not the time or place to argue the point, but untold effort and expense in litigation might be spared if only that were done in the direction of clarifying the muddy waters of our professional terminology which the present state of legal science warrants.

In professional discourse the need often is felt (a) of a complete enumeration of the legal relations to be dealt with and (b) of words which combine a series of terms under one concept. Law documents of every sort exhibit the first need in every variety. The professional man with a well-grounded fear of general terms falls back on an enumeration of particulars which is yet often sufficiently general to overlap at various points. This is seen in such expressions as "convey, transfer, set-over, assign, and alien" where the word "grant" would answer as well; "all right, title, claim, and interest" where there are three redundant words: and, to take an Illinois legislative example[1], "the name of any horse, mare, gelding, colt, or filly . . . shall not be changed." The second need is felt especially by law text writers. Thus, Blackstone built his Commentaries on the division, Rights and Wrongs. It is the second need which is the topic of the present discussion.

When we speak of legal advantages and legal disadvantages or of legal capabilities and constraints, or of legal benefits and burdens, we have described the sum total of legal attitudes. There can be no other. Is there any professional synonym for these combinations? There are three in current use, each of which is inaccurate. Rights and Duties, Rights and Obligations, and Rights and Liabilities are the current usage. Legal advantages consist of claims and immunities and of powers and privileges. Legal disadvantages consist of duties and disabilities and of liabilities and inabilities. Usage has firmly appropriated the word Right for any one or all the four enumerated legal advantages. A right, therefore, may be a claim, an immunity, a privilege, or a power. Mr. Justice Holmes in a recent case has said[2]: "Such words as 'right' are a constant solicitation to fallacy." This usage, however, is too well intrenched to be successfully routed on juristic grounds and the jurist may without difficulty surrender to the usage by insisting upon the term Claim for the strict use of Right (which excludes Power and Privilege).

On the other side of legal relations—at the servient pole—the solution is not so easy. If all legal advantages by a compromise may be called Rights, yet we can not call all legal disadvantages Duties. A duty, of course, is a duty, but we cannot call a liability a duty. The liability of a debtor to be sued is not a duty. Nor can we call an inability a duty. The inability of a creditor to require his debtor to pay a claim which is outlawed is clearly not a duty. The word Duty as a synonym for legal disadvantage simply will not do.

Is there any other one of the specific legal advantages that can be substituted? There is some authority for the word Liability. There is less objection to use of liability as the synonym than to use of duty as the synonym. In other words, there is less solecism in speaking of a duty as a liability (moreover this is the usage of financial accounting) than in speaking of a liability as duty. Yet, in concrete application, the substitute is ungainly. If a man owes money, he lies under a duty to pay. It would be awkward to say that

1. J. & A. Ill. Ann. Stats. I par. 898 p. 526.

2. Jackman v. Rosenbaum Co. (1922), 42 Supt. Ct. Rep. 9 (10); 67 L. ed. 7 (8).

he is liable to pay. He may be liable to suit if he does not pay, but he is not liable until he has fractured his duty. As a snyonym for disability and for inability, liability refuses to function. It must accordingly be dismissed.

There are still two other terms which might be considered—inability and disability. A duty can hardly be thought of as an inability nor can we say that a debtor (for the purposes of legal relation and not of economics) is unable or "inable" to pay. Descriptively, a duty may be regarded as a disability. The servus of the legal relation is disabled from choosing his own conduct. His disablement lies in his duty. He must perform; he is disabled from refusing to perform. But this will not do; the disability describes a negative instead of an affirmative. The debtor is not "disable" to perform. Moreover, there is a sound objection against attempting to use the name of any one of the specific legal disadvantages for a generic meaning. The very fact that the specific terms are apt for their specific purposes points out the difficulty of employing any one of them in a generic sense; and even if it were possible, there would be either confusion on one hand or an enormous waste in attempting to avoid confusion on the other.

Is there any correlative term to Rights outside the four enumerated specific legal advantages? We should not and we cannot leave the word Rights suspended in midair. Correlatives must be correlated. The textbook author can not head his chapter "Rights and—— of Trustees."

At first sight there seems to be no fitter word to replace the blank than Burdens. The dominus of a legal relation has the Right to require an act (claim); the Right to repel an act (immunity); the Right to decline an act (privilege); the Right to do an act (power).

The servus of a legal relation carries the Burden of being required to do an act (duty); the Burden of not being able to do an act (disability); the Burden of not being able to require an act (inability); the Burden of suffering an act (liability). But Right-Burden is a miserable correlation and it is wanting in legal flavor. Moreover, a burden is something to be borne or to be carried. That idea fits in for liability and for duty, but it is a misfit for disability (i. e. what can not be done) and for inability (i. e. what can not be required). Reluctantly we must put this solution aside.

Out of a score of other competitive solutions[3] one emerges which has the merit of less roughness of edge than the others. A term that exhibits at all points accurate correlation to Rights (used in a generic sense) and also to each specific variety (claim, immunity, privilege, and power) probably will require a difficult Greek sesquipedalian invention which is the same thing as saying that the right word will never be a lawyer's word. The term which seems to offer the least resistance to current prejudice against foreign words and to promise the greatest relative adaptability, is Ligation. The combination reads: Rights and Ligations. The verb and adjective forms, therefore, will be ligate (to tie, to bind) and ligable. The ligation represents the legal condition of the servus (or catenarius) of a legal relation. The legal relation regarded as a catena (chain) is the sum total of various elements of which the ligation is only a part. The following sentences illustrate the applicability of the term suggested: (1) A debtor is ligable (or ligated) to perform his duty; (2) a sheriff is ligated from making an excessive levy (here the ligability is a disability); (3) a prosecuting officer is ligated from compelling a witness to incriminate himself (here the ligability rests on inability); (4) a tenant is ligable to have his lease forfeited for breach of covenant.

The problem may be taken in at a glance by the aid of the following diagram[4]:

DOMINUS	LEGAL RELATIONS	SERVUS
RIGHTS	ACTS	LIGATIONS
CLAIM	<———	DUTY
IMMUNITY	] <———	DISABILITY
PRIVILEGE	] ———>	INABILITY
POWER	———>	LIABILITY

[EXPLANATION: The *arrows* indicate acts. The act may be positive (to do) or negative (to refrain). The arrows show the direction of the ligable act—from the servus to the dominus, or from the dominus to the servus. The *brackets* indicate that the dominus of the legal relation can obstruct the act. Thus, in an immunity he can repel the act of the servus; in a privilege, he can decline an act toward the servus.]

3. "Obligations" is excluded on historical grounds. Obligation is a Roman law word with an inconsistent meaning already fixed. In our law where obligation has many variant meanings the term is never used as a synonym for liability.

4. "Ligations" could be accepted even by those who have adopted the Hohfeld terminology without departure from the views upon which it is based, but it needs again to be stated that the Hohfeld tables are fatally defective in starting point and in execution notwithstanding the interesting fact that the Hohfeld Sysem has been received with complete approval by a very able group of legal scholars. (Cf. Yale Law Journal XXXII 167 (n. L): December, 1922.)

In the Hohfeld System, Privilege means Liberty (?). Its correlative is said to be No-Right. It has been shown in detail elsewhere: (1) that this use of "privilege" sacrifices two useful terms, "privilege" in the sense shown in the above diagram, and "liberty"; (2) that in the Hohfeld sense, "privilege" is used contrary to its etymology and contrary to common understanding; (3) that "privilege" (in the sense of liberty) is not an element of any legal relation; (4) that "privilege" (in the sense of liberty) has no correlative; (5) that "No-Right" logically excludes only Right ("Claim" in the above table)—that it might, therefore, mean Power, Liability, Duty, etc.—that undelimited as it is, it is practically meaningless; (5) that "No-Right" as an undelimited negative can not, as it stands, be a correlative of liberty or of anything else; and (6) used in the sense of no-duty (as often happens among those who accept the Hohfeld terminology), "privilege" swallows "power."

For the most recent effort to sustain the Hohfeld terminology see Ill. L. Quar., Dec. 1922,—articles by Professor Charles E. Clark, George W. Goble, and Arthur L. Corbin.

A Woman Without a Country

"The measures which are being advocated at the present time to bring about 'equality' of women before the law are dangerous not so much by reason of their specific provisions as because of their incidental effects. When a radical change is made in an established body of law it is inevitable that some inconsistencies not anticipated by the authors of the reform will arise. Such has proved to be the case with the recent law abolishing the rule that the citizenship of a married woman follows that of her husband. American men and women living abroad and married to foreign born spouses find themselves in a somewhat difficult situation. The English born wife of an American living in England is an American citizen by British law and a British citizen by American law. She is literally without a country or a recognized citizenship. The foreign born wife of an American residing in the United States is in the same position. Many complications as to the descent of property may easily be imagined. Citizenship has, in these days, so much of international significance that uniformity is of considerable importance, and it is very doubtful whether the advantage of this measure will compensate for the difficulties which must necessarily arise therefrom."—From *Ohio Law Bulletin and Reporter*, Dec. 4.

REVIEW OF RECENT SUPREME COURT DECISIONS

Broker's Right to Commission Where Sale Contract Is Void at Domicile of Vendor—Hedging Contracts Prima Facie Valid—License to Shoot and Fish Implied from Habits of Country—Control of Navigable Waters by Secretary of War—Conversion of Suit at Law to Equity Proceeding—Election of Remedies—State Tax on Coal and Interstate Commerce—Vaccination Ordinances

By Edgar Bronson Tolman

Brokers—Conflict of Laws, Lex Loci

The invalidity of a contract of sale under the law of the domicile of the vendor does not deprive the broker of his right to a commission where the contract is valid by the law of the place where it was made and where it was to be performed.

Gaston, Williams & Wigmore v. Warner, Adv. Ops. 16, Sup. Ct. Rep. 18.

A Canadian corporation authorized Philip A. Warner to offer for sale at a certain price the ship "Eskasoni" owned by it. Warner secured a purchaser, and a contract of sale was accordingly drawn up and signed. Subsequently it appeared that the corporation was bound by a British government regulation providing that no one should sell or negotiate for a sale of any British ship without written permission of the Shipping Comptroller. This permission was withheld, and accordingly the corporation refused to consummate the sale and to pay Warner the balance of his commission. Warner brought suit in the District Court and there obtained a directed verdict, the court charging the jury that the invalidity of the contract under British law constituted no defense. Judgment was affirmed by the Circuit Court of Appeals for the Second Circuit and, on writ of certiorari, again by the Supreme Court.

Mr. Justice Sutherland delivered the opinion of the Court. The essential part of his opinion is as follows:

> The contract, as stated, was made in New York, and it does not appear that the contracting parties in making it had in view any other law than that of the place where it was made. It is, therefore, to be governed as to its validity and operation by the law of the State of New York. (citing cases) Tested by that law the contract is valid. By the terms of the contract respondent was "authorized to offer the steamer 'Eskasoni' for sale for four hundred and seventy-five thousand dollars." Nothing was said as to where the ship then was, what flag she carried nor what law was to govern the transaction. The contract of charter and sale provided for the payment of the consideration in several installments in New York City and for the delivery of the ship to the purchasers at that port. . .
>
> The contract with respondent as well as the contract of charter and sale were made and were to be performed within the State of New York, and being valid under the law of that state, the respondent is not to be deprived of his compensation simply because petitioner found itself unable to consummate the latter contract by reason of its inability to perform a condition made necessary by the provisions of the law of another country. . .
>
> Even if the contract of sale was void by British law, all other questions aside, respondent's connection with it was not such as to deprive him of his commission. His action was not to enforce that contract, but his own.

The case was argued by Mr. Cletus Keating for the Canadian Corporation and by Mr. Joseph P. Nolan for Warner.

Contracts—Gambling Contracts, Hedges

Hedging contracts, whereby one who makes contracts of sale or purchase in advance secures himself against fluctuations of the market by counter contracts, are prima facie valid.

Brown v. Thorn, Adv. Ops. 37, Sup. Ct. Rep. 36.

Certain cotton brokers brought suit to recover the balance of an account for the purchase and sale of cotton sold on the New Orleans Cotton Exchange. On the second trial of the case plaintiff secured a verdict, and judgment thereon was affirmed by the Circuit Court of Appeals for the Eighth Circuit. The case came in error and on writ of certiorari to the Supreme Court where the judgment was again affirmed.

Mr. Justice Holmes delivered the opinion of the Court. He said:

> The first ground relied upon for the petition is that the transactions were gambling transactions. That was the petitioner's contention at the trial, but to put it at the lowest, there was evidence to the contrary, the question was left to the jury with instructions that if the plaintiffs knew that the defendant had no intention to deliver or receive the actual cotton they could not recover, and the jury found for the plaintiffs. The defendant contended that his undisclosed intention was enough to defeat the plaintiff's claims; but that is not the law. It is objected that the judge instructed the jury that hedging was lawful, hedging being explained as a means by which manufacturers and others who have to make contracts of purchase or sale in advance secure themselves against the fluctuations of the market by counter contracts. Prima facie such transactions are lawful.

He also held that bought and sold notes which mentioned only the names of the brokers and neither of which was signed by both brokers were sufficient evidence of the transactions under the Cotton Futures Act. Although the brokers had sold at a lower figure than that named in the stop order, the learned Justice held that authorization to do so might be shown by evidence that such orders also carried authorization to sell at the highest figure obtainable.

The case was argued by Mr. James B. McDonough for the petitioner and by Messrs. Ira D. Oglesby and L. C. Going for the respondent brokers.

Game and Fish—Trespass

The rule as to animals ferae naturae does not apply to mussels; these are of fixed habitat and so are in the possession of the owner of the land in which they are found.

Over large expanses of unenclosed and uncultivated land a license to shoot and fish may be implied from the habits of the country.

McKee v. Gratz, Adv. Ops. 36, Sup. Ct. Rep. 16.

Respondent brought suit against petitioners to recover the value of mussel shells removed from respondent's land by petitioners and made into buttons. The District Court directed a verdict for defendants. The Circuit Court of Appeals for the Eighth Circuit heard the case twice and finally held that while the mussels were not part of the realty, plaintiff had title to them. The court assumed that defendants were trespassers and accordingly remanded the case for a new trial. On writ of certiorari the Supreme Court affirmed the judgment of the Circuit Court, but not all the principles laid

Note: The references following cases are to the Advance Opinions of the Supreme Court, published by the Lawyer's Cooperative Publishing Co., and to the Supreme Court Reporter, issued by West Publishing Co.

down, and directed the case to stand for trial by jury in the District Court.

Mr. Justice Holmes delivered the opinion of the Court. He said:

> The mussels were taken alive from the bottom of what seems to have been at times a flowing stream, at times a succession of pools, were boiled on the banks and the shells subsequently removed. As to the plaintiff's title, it is not necessary to say that the mussels were part of the realty within the meaning of the Missouri Statutes or in such sense as to make the plaintiff an absolute owner. It is enough that there is a plain distinction between such creatures and game birds or freely moving fish, that may shift to another jurisdiction without regard to the will of land owner or State. Such birds and fishes are not even in the possession of man. (Citing cases.) On the other hand it seems not unreasonable to say that mussels having a practically fixed habitat and little ability to move are as truly in the possession of the owner of the land in which they are sunk as would be a prehistoric boat discovered under ground or unknown property at the bottom of a canal. (Citing cases.) This is even more obvious as to the shells, when left piled upon the bank, as they were, to await transportation. . . . Possession is enough to warrant recovery of substantial damages for conversion by a trespasser. We say nothing about the character of the stream as to navigability. The jury at least might find that there was nothing in that to prevent the application of what we have said. We are slow to believe that there were public rights extending to the removal of mussels against the land owner's will.

But the learned Justice held that the defendants were not as a matter of law wrongdoers. On this point he said:

> The strict rule of the English common law as to entry upon a close must be taken to be mitigated by a common understanding with regard to the large expanses of unenclosed and uncultivated land in many parts at least of this country. Over these it is customary to wander, shoot and fish at will until the owner sees fit to prohibit it. A license may be implied from the habits of the country.

The existence of such a license and its extent if it did exist, the learned Justice held were questions for a jury. He also held that defendants were liable, if at all, only for the value of the mussels at the time of their conversion, and not the value added by manufacture.

The case was argued by Mr. Lon O. Hocker for petitioners and by Mr. S. Mayner Wallace for respondent.

Navigable Waters—Control of By Secretary of War

Conditions imposed by the Secretary of War in granting the right to build a bridge over a navigable stream must be regarded as a determination of what is reasonably necessary to insure safe navigation, and the bridge builder is not guilty of negligence in failing to anticipate changes in the channel, particularly where such changes are caused by dredging operations of the Federal Government.

Southern Pacific Co. v. Olympian Dredging Co., Adv. Ops. 17, Sup. Ct. Rep. 26.

In 1895 the California Pacific Railroad Company was authorized to build a new bridge across the Sacramento River. The plans therefor were approved by the Secretary of War, on condition that the company remove the old bridge and cut off the old piers to a depth of seven feet below the level of low water. The company fulfilled this condition, and indeed cut off the piers three or four feet lower than was required. Thereafter the Federal Government built a wing dam in the river and conducted dredging operations and as a result the bed of the river was gradually lowered until in 1918 the piers of the old bridge protruded some distance above the new river bed. In that year respondent's dredger collided with these stumps and suffered injury. Respondent filed a libel in the District Court for the Southern District of California, claiming damages from the Southern Pacific and another railroad company using the bridge. Judgment for the railroad companies was reversed by the Circuit Court of Appeals for the Ninth Circuit. That court held that it was the duty of the railroad to anticipate and guard against changes in the channel. On writ of certiorari to the Supreme Court the judgment of the Circuit Court was reversed and that of the District Court affirmed.

Mr. Justice Sutherland delivered the opinion of the Court. After reviewing the provisions of the Act of September, 1890, by which Congress inaugurated a policy of general control over navigable waters, and under which the Secretary of War had imposed conditions upon the erection of the bridge, he said:

> That the Secretary of War was authorized to impose the condition heretofore quoted does not admit of doubt. The power to approve implies the power to disapprove and the power to disapprove necessarily includes the lesser power to condition an approval. In the light of this general assumption by Congress of control over the subject and of the large powers delegated to the Secretary, the condition imposed by that officer cannot be considered otherwise than as an authoritative determination of what was reasonably necessary to be done to insure free and safe navigation so far as the obstruction in question was concerned.
>
> To hold as did the Circuit Court of Appeals that this determination afforded no protection to petitioners, but that they relied upon it only at their peril, we think is a conclusion without warrant. Having complied with the direction of the Secretary, and having no further interest in anything at that point on the river, it seems altogether unreasonable to hold them to an indefinite and speculative responsibility for future changed conditions.

The learned Justice cited cases holding that Congress intended such decisions of the Secretary to have the same force and effect as would have been accorded to direct legislative action. He said further:

> Even if we leave out of consideration altogether the order of the Secretary of War, it is still difficult to see upon what just ground petitioners could be held liable.
>
> The changes which occurred in the bed of the river were not due to natural causes, whose effect could reasonably have been anticipated, but were due to the artificial operations of the Government the effect of which appeared only after the lapse of a long period of years.
>
> We agree with what was said by the District Court, in deciding the instant case, upon that subject: "While the Railroad Company was perhaps required to take notice of the changes in the course of the channel or stream from natural causes and provide against any injury that might result from such changes, it could not, in my opinion, be required to take notice of such radical changes as occurred here by the acts of the Government over which it had no control and which it had no reason to anticipate or provide against."

The case was argued by Mr. William R. Harr for the railroad companies and by Mr. Thomas E. Haven for the Olympian Dredging Company.

Practice—Conversion of Suit at Law to Proceeding in Equity

Where defendant to an action at law claims to be only a stakeholder and asks that other claimants be made parties, the action is converted into an equitable proceeding and it should therefore be reviewed as an appeal in equity.

Liberty Oil Co. v. Condon National Bank, Adv. Ops. 123, Sup. Ct. Rep.—

The Liberty Oil Company began an action at law in the District Court of Kansas against the Condon

National Bank. It alleged that it had contracted to buy certain oil lands from the Atlas Petroleum Company. By the terms of the contract the vendee was bound to deposit $100,000 with the defendant bank. If the vendor produced a good abstract of title, the vendee was to pay the bank the remainder of the purchase price and receive deeds to the lands. If the vendee refused to proceed, although a good abstract was offered, then the $100,000 was to be paid to the vendor as liquidated damages. Should the vendor fail to produce a good abstract, the bank was to return the money to the vendee and the contract was to become null and void. The Liberty Oil Company alleged that the title offered by the Petroleum Company was defective and asked that defendant be required to pay over the $100,000. Defendant answered that it had no interest in the money, but that it was also claimed by the vendors, and asked that they be made parties. This was accordingly done, and the vendors filed a cross petition in which they alleged that the title offered by them was good and marketable, and asked that the deposit be paid to them and also that judgment be entered for them for the full price of the land.

The evidence heard by the court was preserved in a bill of exceptions and also in a transcript of record. The District Court found generally for the vendors, and entered judgment for them for $100,000 and interest. Upon appeal to the Circuit Court of Appeals for the Eighth Circuit, that court held that this was an action at law and that it was the duty of the court to consider the appeal as a writ of error, but that as there was only general finding for the vendors, the court could not consider the sufficiency of the evidence, and accordingly affirmed the judgment. On certiorari, the Supreme Court held that it was error for the Circuit Court to have reviewed the case as an action at law, and that it should have considered the issue of the marketability of the title. The Supreme Court therefore reversed the judgment and remanded the case to the Circuit Court of Appeals for consideration of the issues of law and fact.

The CHIEF JUSTICE delivered the opinion of the Court. He said:

> We think the cause was then equitable and the proper review was by appeal. The case began as an action at law for money had and received. When the defendant bank claimed to be only a stakeholder of the deposit, disclaimed interest therein and offered to pay into court, and asked that the other claimants of the fund be made parties, its answer and cross petition became an equitable defense and a prayer for affirmative equitable relief in the nature of a bill for interpleader.

After quoting Section 247b of the Judicial Code, which provides that equitable defenses may be presented in actions at law, and equitable relief obtained, he continued:

> This section applies to the case before us. The proceeding was changed by defendant's answer and cross petition from one at law to one in equity with all the consequences flowing therefrom.

The proper practice, the learned Chief Justice said, would have been to transfer the cause to the equity side of the court. But he continued:

> Nor, by the failure to order the transfer in this case, did the suit lose the equitable character it had taken on by the answer and cross-petition of the defendant. The situation thus produced was quite like that under state civil codes of procedure in which there is but one form of civil action, the formal distinction between proceedings in law and equity is abolished and remedies at law and in equity are available to the parties in the same court and the same cause. Neither legal or equitable remedies are abolished under such codes. "What was an action at law before the code is still an action founded on legal principles; and what was a bill in equity before the code, is still a civil action founded on principles of equity."

After referring to the limitation placed upon Federal union of suits at law and in equity by the Seventh Amendment, he quoted Section 274a of the Judicial Code. This section gives a party the right to amend his pleadings so as to obviate any objection that the action was not brought on the right side of the court. He then said:

> To be sure, these sections do not create one form of civil action as do the codes of procedure in the States, but they manifest a purpose on the part of Congress to change from a suit at law to one in equity and the reverse with as little delay and as little insistence on form as possible and are long steps towards code practice.
>
> Coming now to apply those two sections thus construed to the case before us, we find that by defendant's answer and the court's order it became a bill of interpleader in equity. Thereafter the proceedings should have been so treated, both in the trial and appellate courts. . . .
>
> It was, therefore, error by the Circuit Court of Appeals to proceed as if it were reviewing a judgment in a suit at law upon a bill of exceptions. It is true that the record contained a bill of exceptions, but there was also a transcript of the same evidence certified as required in appeals in equity. The plaintiff below was evidently not certain of the proper practice and prepared for either writ of error or appeal. Under Section 269 of the Judicial Code as amended by the Act February 26, 1919, ch. 48, 40 Stat. 1181, appellate courts are enjoined to give judgment after an examination of the record without regard to technical errors, defects or exceptions which do not affect the substantial rights of the parties; and under Section 274b, whether the review is sought by writ of error or appeal, the appellate court is given full power to render such judgment upon the record as law and justice shall require. It follows that the court should have considered the issue of law and fact upon which the decree of the District Court depended, that is, whether there was good and marketable title.

The case was argued by Mr. F. W. Lehmann for the vendee and by Mr. John J. Jones for respondents, the bank and the Petroleum Company.

Practice—Election of Remedies, Res Judicata

A suit at law to recover the value of lands fraudulently obtained is barred where the United States has previously elected to pursue a suit in equity to rescind the patents and the bill has been dismissed because barred by the statute of limitations.

United States v. Oregon Lumber Co., Adv. Ops. 99, Sup. Ct. Rep.—

In 1918 the United States brought suit in the District Court for the District of Oregon to recover damages for the fraudulent acquisition of certain lands. The defendants, the Oregon Lumber Company and its officers, set up in defense the fact that in 1912 the United States had brought a bill in equity to set aside the patents for the same lands, pleading substantially the same facts to support the alleged fraud, and that after trial on the merits, the bill had been dismissed on the ground that the United States had had full knowledge of the matters complained of for at least six years prior to the institution of the suit, and hence was barred, as provided by the Act of March 3, 1891. The District Court held that the prosecution of the bill in equity had amounted to a final election of remedies, and overruled a demurrer to the plea. Upon appeal to the Circuit Court of Appeals for the Ninth Circuit, the question as to whether the present suit at law was barred by reason of the unsuccessful suit in equity, was

certified to the Supreme Court. That court answered this question in the affirmative.

Mr. Justice Sutherland delivered the opinion of the Court. After reviewing the facts he said:

> Upon the facts stated, the sale was voidable (citing case), and the plaintiff in error was entitled either to disaffirm the same and recover the lands or affirm it and recover damages for the fraud. It could not do both. Both remedies were appropriate to the facts, but they were inconsistent since the first was founded upon a disaffirmance and the second upon an affirmance of a voidable transaction. . . . (citing cases). Any decisive action by a party, with knowledge of his rights and of the facts, determines his election in the case of inconsistent remedies, and one of the most unequivocal of such determinative acts is the bringing of a suit based upon one or the other of these inconsistent conclusions.

Distinguishing a case relied on by plaintiff in error, he continued:

> But here in the equity suit, the plaintiff in error upon the coming in of the defendant's plea of the statute of limitations made no offer to amend or request to transfer the case to the law docket, but proceeded to trial and judgment upon the original bill, with knowledge of all the facts for more than six years prior to the filing of the bill. Defeated in its equity suit, it brought its action at law upon the same allegations of fact. We think it is not admissible to thus speculate upon the action of the court, and, having met with an adverse decision, to again vex the defendant with another and inconsistent action upon the same facts.

The learned Justice held that if the election to proceed was not final and binding when the bill was filed, it surely became so when plaintiff decided to go ahead in the face of the plea of the statute of limitations.

After a review of cases cited, he disposed of another argument urged upon the court:

> It is further urged that the judgment of the District Court was not upon the merits but upon the plea in bar and that, therefore, when the equity suit was begun, plaintiff in error had no choice of remedies, since the judgment rendered established that in fact there was no remedy in equity at all. The contention, we think, is unsound.
>
> The defense of the statute of limitation is not a technical defense but substantial and meritorious. The great weight of modern authority is to this effect.

Here the learned Justice quoted from various authorities to the effect that the dismissal of a suit because of lapse of time is a judgment upon the merits. In concluding, he said:

> The distinguishing feature of the instant case is that after the coming in of the answer, pleading the statute of limitations, and the plain warning thus conveyed of the danger of continuing the equity suit further, the plaintiff in error persisted in pursuing it to final judgment, instead of promptly reforming the cause or dismissing the bill and seeking the alternative remedy not subject to the same defense. The doctrine of election of remedies and that of *res adjudicata* are not the same, but they have this in common that each has for its underlying basis the maxim which forbids that one shall be twice vexed for one and the same cause. The policy embodied in this maxim we think requires us to hold that the plaintiff in error, in bringing the original suit, and in continuing after the plea in bar to follow it to a final determination, made an irrevocable election, and that it is now estopped from maintaining the present inconsistent action.

Mr. Justice Brandeis, with whom concurred the Chief Justice and Mr. Justice Holmes, delivered a dissenting opinion containing extensive citations of authority. The following abridgement shows the line of argument pursued by this minority:

> The thing adjudged in the equity case was solely that the fraud had been discovered by the Government more than six years before the commencement of the suit; and that for this reason the patent could not be annulled. There was no adjudication of the Government's substantive right. And since it had two remedies to protect that right, and the fact found is not a bar to an action at law, no suggestion is made that the decree of dismissal bars this action as *res judicata*. There is likewise no suggestion of an estopper *in pais*. . . .
>
> The doctrine of election of remedies is not a rule of substantive law. It is a rule of procedure or judicial administration. . . . In every case in which the question presented was actually one of election of remedies, this court held that the doctrine did not apply; giving as a reason that one or the other of its essential elements was absent. These essentials are that the party must have actually had two remedies and that the remedy in question must be inconsistent with the other previously invoked. Here neither of these essential elements was present.
>
> The Government did not have a remedy in equity when the suit to annul the patent was begun or at any time thereafter. That this is true was established by the decree in the equity suit. The Government's alleged choice of the equitable remedy was, therefore, "not an election but an hypothesis." . . . So in the case at bar, because the equitable remedy theretofore invoked was not in fact available to the Government, its right to proceed at law was not lost, under the doctrine of election of remedies.
>
> Moreover, an action at law for deceit is not inconsistent with a prior unsuccessful suit to annul the patent. This case must not be confused with those in which it has been held that a prior action at law on a contract, or other proceeding arising out of it, bars a later suit to rescind; as where an action on a purchase money note has been held to bar a later suit by the vendor to set aside the conveyance for fraud. There, the reason why the conveyance cannot be set aside is that by suing at law the vendor exercises his option to affirm the voidable transaction, and cannot thereafter disaffirm it. In so doing he makes a choice of substantive rights. But where the vendor's first attempt to obtain redress was by way of rescission, and there was in fact then no right to rescind, his substantive rights have not been changed. This is the situation presented in the case at bar.

The case was argued by Assistant Attorney General Riter for the United States, and by Mr. W. Lair Thompson for the lumber company.

Taxation—Discrimination, Interstate Commerce

A state tax on anthracite coal only, levied before the product has entered into the currents of trade, is not discriminatory, nor is it a regulation of interstate commerce.

Heisler v. Thomas Colliery Co., Adv. Ops. 119, Sup. Ct. Rep. 83.

A Pennsylvania statute, passed in 1921, imposed a tax on anthracite coal amounting to 1½ per cent. of its value when washed or screened, the tax to be assessed after the coal had been so prepared and was "ready for shipment or market." Plaintiff in error, a stockholder in the Thomas Colliery Company, brought suit in the Court of Common Pleas against the company and the tax officials, asking that the enforcement of the Act be enjoined. The trial court dismissed the suit, this decree was affirmed by the Supreme Court of Pennsylvania, and on writ of error to the Supreme Court of the United States it was again affirmed.

Mr. Justice McKenna delivered the opinion of the Court. Plaintiff in error attacked the constitutionality of the Act on two grounds. First, he contended that it denied him the equal protection of the laws in that it taxed only anthracite coal and not bituminous. The learned Justice declared that the justification of any classification depended on the reasonableness of the relation of the properties on which the classification was based to the purpose which the classification served. He said:

> And so classification has uses in government—indeed, we may say, necessities in government, for government as well as persons has purposes, varied and, at times, exigent, and its legislation must be accom-

modated to them, either in convenience or necessity. That government has the power to do so we have often pronounced, not, however, omitting to recognize the restraints upon the power while expressing its range and adaptation. In its exercise in taxation, we have said, it is competent for a State to exempt certain kinds of property and tax others, the restraints upon it only being against "clear and hostile discriminations against particular persons and classes." Discriminations merely are not inhibited, for, it was recognized, that there are "discriminations which the best interests of society require."

After citing many cases he passed to a comparison of the two sorts of coal. Referring to the resemblances urged in the bill, he said:

The detail is interesting. It includes the description of the processes of nature in the formation of the coals, their particular properties, composition and appearances, and the localities of their production. Anthracite coal, it is said, is found only in nine counties out of sixty-seven in the State of Pennsylvania; bituminous coal in twenty-four counties. Both are sold, is the allegation, to places outside of the State and in competition for fuel purposes, and that the anthracite in certain sizes, termed steam sizes, competes with bituminous coal, and certain subgrades (intermediate grades) of the latter with certain subgrades of anthracite.

But the view of the court on this point appears in the following excerpt:

The differences between them is a just basis for their different classification; and the differences are great and important. They differ even as fuels, they differ fundamentally in other particulars. Anthracite coal has no substantial use beyond a fuel, bituminous has other uses. Products of utility are obtained from it. The fact is not denied and the products are enumerated, and the extent of their use. They are, therefore, incentives to industries that the State in natural policy might well hesitate to obstruct or burden, and to yield to the policy or consider it, is well within the concession of the power of the State expressed in the cases we have cited. The distinction in the treatment of the respective coals being within the power conceded by the cases to the State, it had logical and legal justification, and is, necessarily, not unreasonable or arbitrary. We concur, therefore, in the decision of the Supreme Court of the State sustaining the Act of 1921.

The second contention of plaintiff in error was that the Act was invalid as a regulation upon interstate commerce. It was pointed out that almost all the anthracite coal produced in this country is mined in Pennsylvania, and that therefore the tax levied a tribute upon the consumption of other States. To this argument the learned Justice made the following reply:

Whether any statute or action of a State impinges upon interstate commerce depends upon the statute or action, not upon what is said about it or the motive which impelled it, and a tax upon articles in one State that are destined for use in another State cannot be called a regulation of interstate commerce whether imposed in the certainty of a return from a monopoly existing, or in the doubt and chances because of competition. The action of the State as a regulation of interstate commerce does not depend upon the degree of interference; it is illegal in any degree.

The result of the contention that products of one state destined to be marketed in another state, were subjects of interstate commerce, was suggested as follows:

It would nationalize all industries, it would nationalize and withdraw from State jurisdiction and deliver to Federal commercial control the fruits of California and the South, the wheat of the West and its meats, the cotton of the South, the shoes of Massachusetts and the woolen industries of other States at the very inception of their production or growth, that is, the fruits unpicked, the cotton and wheat ungathered, hides and flesh of cattle yet "on the hoof," wool yet unshorn, and coal yet unmined because they are in varying percentages destined for and surely to be exported to States other than those of their production.

This coal, still lying at the mines that produced it, could not be a part of interstate commerce. The precise question had in fact been decided in Coe v. Errol, 116 U. S. 517, and quoting from this case the learned Justice said:

The point of time when goods cease to be under the power of the State and come under the protection of the Constitution was considered. To express it, as the court did, "there must be a point of time when they (goods) cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the State of their origin to that of their destination."

The case was argued by Mr. Lewis Marshall for plaintiff in error, by Mr. George E. Alter for the Thomas Colliery Company, and by Mr. J. Weston Allen as amicus curiae for nine states.

Vaccination Statutes

An attack on the constitutionality of an ordinance requiring a child to produce a certificate of vaccination before being allowed to attend school, does not present a question of the validity of a law sufficient to support a writ of error to the Supreme Court.

Zucht v. King, Adv. Ops. 28, Sup. Ct. Rep. 24.

Rosalyn Zucht was excluded from the schools of San Antonio, Texas, because of her refusal to submit to vaccination and failure to present a certificate of vaccination as required by ordinances of that city. She accordingly brought a bill against the officials responsible for her exclusion, alleging that the ordinances denied her due process of law because they in effect made vaccination compulsory, and that the ordinances were void because they left to the Board of Health unregulated discretion as to when to apply the law. The bill asked relief by injunction and damages. A demurrer to the bill was sustained and the bill dismissed. Judgment was affirmed by the Court of Civil Appeals for the Fourth Supreme Judicial District of the State of Texas, and a writ of error granted by that court was dismissed by the Supreme Court of the United States.

Mr. Justice Brandeis delivered the opinion of the Court. He said:

A city ordinance is a law of the State within the meaning of Section 237 of the Judicial Code as amended, which provides a review by writ of error where the validity of a law is sustained by the highest court of the State in which a decision in the suit could be had. . . . But, although the validity of a law was formally drawn in question, it is our duty to decline jurisdiction whenever it appears that the constitutional question presented is not, and was not at the time of granting the writ, substantial in character.

The learned Justice cited cases holding that the State might constitutionally provide for compulsory vaccination, and cases upholding the power of municipalities to vest in their officials broad discretion as to the application and enforcement of health laws. He then said:

In view of these decisions we find in the record no question as to the validity of the ordinance sufficiently substantial to support the writ of error. Unlike Yick Wo v. Hopkins, 118 U. S. 356, these ordinances confer not arbitrary power, but only that broad discretion required for the protection of the public health.

He further held that the question as to whether the officials had discriminated against plaintiff in enforcing the ordinances was such as could be reviewed only on petition for a writ of certiorari and accordingly he dismissed the writ of error.

The case was argued by Mr. Don A. Bliss for Rosalyn Zucht and by Messrs. R. L. Ball and A. W. Seeligson for the respondent officials.

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AN UNUSUAL BIOGRAPHY

In the archives of the Superior Court of Louisiana there has been recorded a document of such unusual interest, that it has been reproduced in full in another part of this issue.

The life of a great and successful lawyer is always rich in interest to his professional brethren and a source of helpful enlightenment to the neophyte seeking to find the path which leads to high attainment. To such we commend an intent perusal of the life of Edgar Howard Farrar.

The most obvious lesson for him who faces the beginning of a professional career is that intense effort and never ending study are indispensable prerequisites to success in the law. There can be no easy by-path to the high plateau. He who will not climb must stay on the lower levels.

Less obvious but equally true it is that love of truth, devotion to principle, and a courageous soul mark all those who, like Farrar, reach the higher ranks in the ministry of justice.

Farrar was fortunate in his biographer. Mr. Henry Planché Dart was his contemporary. He brought to his task a personal affection and an intimate knowledge. He paints a vivid picture of the real Farrar, and in so doing he surrounds his portrait with a historic background approaching in interest that of the central figure.

If any considerable number of Farrar's letters have the value of the two which the biographer quotes, one to the Governor of Louisiana and the other to a former Secretary of State, there should be a volume of them published.

THE IRISH FREE STATE CONSTITUTION

Dangers and difficulties attend the birth and swaddling of most national constitutions, and that of the Irish Free State is no exception to the rule. But whatever the future may hold for it, as a document it attracts attention and commands respect. The immense amount of constitutional experience which the framers of the new government had to draw on has not been neglected. An American on reading it finds himself on familiar ground as he comes across the guarantees of the inviolability of person and of dwelling, of free speech, free exercise of religion, due process of law, habeas corpus, no ex post facto law, which are the stamp of free men and of free governments. The British reader will find an additional familiar point in the method of parliamentary government and ministerial responsibility established and the representation accorded the Universities. And the citizen of certain continental countries will find in the constitution of the Senate, with its plans for including men of special distinction in various fields who have reflected credit on the nation and its recognition of special interests, the echo of a familiar idea. The dignity of the Judiciary is properly secured by its tenure, in the case of the Supreme Court and High Court judges only terminable for misbehavior or incapacity, and then only by a resolution of both houses of Parliament, and by a jurisdiction extending in their cases to the decision of the validity of statutes under the Constitution. The Canadian practice which gives the representative of the Crown the right to reserve a bill for a signification of the King's pleasure has been adopted, but this privilege is seldom exercised. If the Constitution does not apply to the entire area of Ireland, Irishmen may reflect that there are areas to the north of us in the British Empire not within the Dominion of Canada, and that our American Constitution might even have gone into effect without the participation of the whole number of original states.

APPEAL BY IMPEACHMENT

The Judiciary Committee of the House of Representatives has recommended the dismissal of the impeachment proceedings against the Attorney-General.

The coincidence of the institution of these proceedings with the activities of the Attorney-

General in the "Shop Crafts" injunction, had a sinister significance which was not removed by the failure to include that matter in the hearings before the committee.

In October last at Canton, Ohio, the Attorney-General delivered an address in which he gave an account of his stewardship, referring particularly to that injunction case and to the investigation and prosecution of the so-called "war fraud cases." This address has been printed and given such publicity that space cannot well be spared in these columns for its re-publication. It is, however, a significant document, well worthy of a careful perusal by every lawyer.

IGNORANCE OF HISTORY IS NO EXCUSE

It is time to expand the maxim that "ignorance of the law excuses no one" by adding a declaration that ignorance of the simplest facts of popular history cannot absolve from blame. The observation is suggested by the fact that the organization and supposed activities of the Ku Klux Klan are bulking large in the public prints.

If the organizers of this species of midnight mummery do not understand that their methods, even when technically lawful, are a constant encouragement to irresponsible lawlessness by the ill-disposed within their own order as well as outside it, they are certainly ignorant of the history that followed the original organization whose name they have proceeded to appropriate. If they do not understand that in many communities old factional feuds, private grudges, and economic hates, will eventually seize the opportunity to use either the actual organization or methods of the "Klan" for their own purposes, they know very little of human nature.

If they think their avowed good intentions justify them in acting as lawlessly as they will, that their idea of what is good may come, they evidently do not know that some of the cruelest acts in history have been perpetrated by men who were conscientiously convinced that they were acting for the glory of God. If they think that Justice can be administered secretly by secret judges, they have apparently never heard of the odium that every school-boy knows attaches to the proceedings of the old British Star-Chamber; and even in this hated institution only the proceedings and not the names of judges were kept from the public. If they think the arbitrary acts of individuals can be substituted for the courts, they have still to learn of the age-long effort of humanity to get rid of just such methods—of the "lettres de cachet" of the French king, for instance, that an outraged people abolished as one reform of the revolution.

If they think that a night-riding mob can administer justice in an organized community, then the long struggle of the race to give every man the benefit of counsel, a fair hearing, and the protection of orderly methods of testing evidence, has been for them without significance. They may be ignorant of all these things, but they should not be. Their opportunities to learn them in this free country have been, and remain, unexampled.

NO GROUND FOR INCREDULITY

In the seventeenth annual report of the President of the Carnegie Foundation, Mr. Alfred Z. Reed, whose thorough investigation of the subject of training for the law recently made the entire profession his debtor, suggests that until both the American Bar Association and the Association of American Law Schools square their practices with their principles, the public is bound to remain a bit incredulous as to the importance that is attached to the new educational standard even by the Associations that proclaim them. He bases this statement on the fact that requirements for the admission of individuals to the American Bar Association have at present no relation to the kind of education that applicants have had; further that the requirements for the admission of law schools to membership in the Association of American Law Schools cover several matters, some of which are not touched upon in the new American Bar Association platform. The criticism seems to be a counsel of perfection. In starting a movement for raising the standards of admission to the bar, which must necessarily be a gradual process, the American Bar Association was hardly under a logical constraint or moral obligation to make its own immediate demands for admission conform to these standards. The American Bar Association is necessarily recruited from the best elements of the bar as it exists at the time; and the movement to improve the average qualifications of members is a movement to improve the field from which recruits must be taken in the future, but not an attempt to anticipate final results.

HOW A JUDGE FUNCTIONS

By Hon. Francis E. Baker

Judge United States Circuit Court of Appeals
Seventh Circuit

IN four instructive and entertaining lectures* Judge Cardozo of the New York Court of Appeals was letting the students in the Yale Law School see how the wheels go round when a judicial decision is being formulated. I do not know how far the book is autobiographic. Not at all, professedly; but inasmuch as no one can think and speak of men and things except from the point of his own outlook, these lectures are necessarily somewhat self-disclosive. Though he does not directly put himself under the entomologist's microscope, as did Spencer in his autobiography, there is probably enough revealed to be of substantial value to the lawyer who has cases on the docket of the court of which judge Cardozo is a distinguished member and who believes with Choate that it is fully as important to know the idiosyncracies of the judge as the quirks of the law.

Many lawsuits end with the finding of facts from conflicting evidence. But fact-finding, either initially or on review, is outside the function of the judge as maker or applicator of law.

With the facts found or stipulated, a judgment may be based upon a clear provision of a constitution or a statute or upon a principle of the common law that is well settled and protected by the rule of *stare decisis*. What worries the lawyer and fascinates the judge is the lawsuit that must be decided, but for the decision of which there is no written or unwritten rule at hand.

If law is not merely a body of prescriptions of conduct, but is in truth that which rules conduct, then law only comes into being and stays in being through those judicial judgments that are put into execution by the actual or potential force of organized society. Why shouldn't judges confess it? Or rather calmly proclaim it as the inevitable result of the command of the State that citizens quit trying to settle their controversies by means of clubs and guns and submit to the decision of a court? Naturally judges could not confess when they were unconscious of being law-makers. With the first glimmerings of consciousness they were so startled that they hid behind various fictions and pretenses. But now that the fictions are recognized for what they are, why not discard the camouflage?

In thus asserting that law is case-made, judges may at the same time properly protest that they are not invading the province of legislation. A statute prescribes a course of future conduct; a case determines the consequences of past conduct. Adjudication and statute-making, as past and future, can not cross. A case is a definite pronouncement; but a statute doesn't mean what it says; it means only what the judges in the case say that it means; it is not law; it is merely one of the materials out of which law, through cases, is made.

When a judge is brought to assessing the consequences of the controversy and there is no written or unwritten rule at hand, when he supplements or modifies the common law, when he recasts or plasters up the interstices in the statutes, what means does he use?

His commonest start is reasoning by analogy from the nearest precedents. It may be difficult to tell what line of precedents is nearest to the new problem. History of the development of existing legal principles may determine what line to follow. But a true appraisal of the lessons of juristic history may not be had without a study of the history of the political, economic, moral, and social conditions out of which (or to express which) the legal principles were drawn.

If analysis and deduction do not afford a solution, he may apply natural law. Natural law, in the case in hand, is the answer to the question: What consequences would the fair-minded man expect to flow from these facts? He hunts for the fair-minded man in his own consciousness; but, in order to eliminate the personal element as much as possible, he should check up his own instinctive inclination toward certain action as being the justice of the case by bringing within the field of his consciousness for comparison a knowledge of what has been said and done, in all times and in all circumstances, by all judges, by all codifiers, and by all philosophizers. With Bacon (but today with less hope of fulfilment) he should profess to make the whole domain of knowledge his.

He should remember, in taking up his problem, that he is pulled in opposite directions by two forces. On the one side is the tendency toward rigidity for the sake of certainty; on the other, the demand of new and changing conditions to burst and throw aside the old formulas. Once the common law was so rigid that it took a new court and a new method to break up the frozen field. Equity brought ethics and morality into the controversies between litigants. In the middle and latter part of the nineteenth century, the tendency in our country was probably toward rigidity; but equity restrained a far swing. Now the swing is the other way in response to the demand that more than the equities of the parties be regarded, namely, the social effects of the decision upon the body of the people.

By using all available means, the judge may produce a clear and definite rule of law on the facts of the case in hand; but he can not define Law. For Law is a variable whose content at any moment can only be approximated by estimating the changing lines of judicial inclusion and exclusion. Probably as much as can be done in the way of definition is to say that Law is concerned with the ordering of external acts between man and man and between man and organized society to obtain peace and security, and is the resultant of the interaction of many minds ripened by study and observation and illuminated by the achievements and beaconed by the errors of the past.

*The Nature of the Judicial Process, by Benjamin N. Cardozo, L.L. D. New Haven: Yale University Press.

CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and in Neighboring Fields and to Brief Mention of the Interesting and Significant Contributions Appearing in Current Legal Periodicals

I. Among Recent Books

THE Real Lincoln, A Portrait, by Jesse W. Weik. Houghton Mifflin Company. Boston, 1922.—All who are interested in Abraham Lincoln will welcome this addition to their knowledge of the personality of the great war president. Mr. Weik was himself well acquainted with Lincoln; he was an intimate friend of Herndon; and he has sought out all known men and women who knew Lincoln or who belonged to the Springfield circle of friends. Moreover, the work has been done in that quiet and earnest manner that marks the man of real ability and perfect devotion to truth. There is evident on every page the desire to present the subject just as he appeared in life. There is no effort to magnify less attractive traits, no thought of making a sensation. It is simply an excellent book treating of Lincoln the man.

The old story about Lincoln's paternity is definitely determined, although Doctor William E. Barton has already made this unnecessary in his *Paternity of Abraham Lincoln.* But Weik makes plain that Lincoln thought himself an illegitimate son of some Virginia gentleman. Lord Charnwood described Lincoln's family and immediate kindred as hardly worth attention from the President; and Weik supports the view, but he does not magnify the thriftlessness of the mute folk from whom Lincoln sprang. They were simply ne'er do wells of the Virginia-Kentucky frontier stock. But however poor a figure John Johnson and John Hanks made in the world, they and their kind appear to better advantage than blustering, selfish and self-centered Mrs. Lincoln, unwilling to allow one of Lincoln's kindred to live in the house or even make extended visits. The daughter of a fine family and descendent of a justice of the Supreme Court of the United States fails to make as kindly and lovable a figure as poor old Thomas Lincoln, with all his illiteracy.

There are fragments of unpublished documents showing slightly different qualities in Lincoln's character, and some of the comments of men like Horace White compel the belief that the greatest of Presidents, in some respects, failed in many of his estimates of character and even continued the most intimate relations with men shown by conclusive evidence to have been dishonest. The best known case, that of Simon Cameron, is made clearer; and one of the most disreputable of Lincoln's appointees, Judge Mark W. Delahay of Kansas, is shown to have enjoyed the Presidential favor long after he was proved to have been both a drunken judge and perhaps an embezzler of public funds. At least Lincoln never disavowed his former friend or gave any indication of disappointment. Which perhaps explains Gideon Welles' bitter complaint that Lincoln had quashed the proceedings against certain embezzlers of public moneys whom the Secretary of the Navy had brought into court.

The story of Lincoln's one "exorbitant" fee for his professional services is told with a certain amusement, for the lawyer who asked and demanded in a lawsuit five thousand dollars from the Illinois Central Railroad Company for services not very onerous gave his services to William Dorman for whom he had done quite as much work. And I think it is new to historians that he appeared early one morning at the house of his banker to claim an unsettled fee in order to get his law partner out of the hands of the sheriff because of a drunken spree which had resulted in considerable damage to property in the town. It is very much in character but nevertheless amusing to find Lincoln who never drank wines or intoxicants of any kind getting out of bed before dawn in order to save William H. Herndon from the disgrace of a public trial for disorderly conduct in the very neighborhood of their already famous law offices!

Weik adds further to the strange figure by showing how Lincoln was quite convinced that, after the great debate of 1858, he might then become a popular lecturer after the manner of Henry Ward Beecher and the awkward Horace Greely. He tried earnestly to entertain an audience at Jacksonville in the winter of 1859. His failure did not convince him, and he tried again in Springfield a little later. The local papers gave him a flattering advertisement, appealing for a crowd after the manner of the time. But the neighbors did not care to pay the fee and risk the entertainment. Lincoln retired from the lyceum field utterly defeated at the very time that New York asked him to speak in that city with a view to ascertain whether he should be nominated to the presidency. How true the saying about the prophet in his own country! The printed excerpts from the lecture on *Discoveries and Inventions* show well enough, however, why the people of Springfield did not care to hear their kindly friend and neighbor discourse on the progress of mankind from the fig leaf to Mrs. Lincoln's stiff silk dresses.

The author has made a good portrait. Lincoln appears once more as the grotesque Illinois figure history has known him. He also appears in these pages as the clearest reasoner, the most honest politician and the most magnanimous opponent. It is a good and a fresh story—purely personal and reminiscent of Illinois life in its pioneer days.

WILLIAM E. DODD.

The University of Chicago.

The Constitution of the United States, Its Sources and Its Applications, by Thomas James Norton. Little, Brown & Co., Boston. $2.—The author of this book has rendered a valuable public service which entitles him to the gratitude of all lovers of liberty everywhere. In the preface the author declares that:

> The purpose of this book is to make accessible to the citizen and his son, to his newly enfranchised wife and daughter, and especially to his children in school, such a

knowledge of the Constitution of the United States as will serve in emergency as a first line of defence.

The task undertaken by Mr. Norton has been well performed.

The Constitution is here presented with plain and simple outlines of historical data which illuminate and explain that immortal document which has won the admiration of the greatest statesman of all succeeding generations.

No thoughtful person can read this splendid book without a feeling akin to reverence for the memory of the founders of our government.

In an address which he delivered before the Bar of Charleston, May 10, 1847, Daniel Webster said "Liberty exists in proportion to wholesome restraint." The framers of the Constitution realized fully the need of such restraint.

Mr. Norton has given us in concise and attractive form the historical background of each provision of the Constitution with the reasons which led to its adoption, without attempt at elaboration.

At no time in our history has there existed so great need that the average individual should have a knowledge of the Constitution, as the present. For more than a decade there have been persistent demands for Constitutional amendments, many of which, if adopted, could not prove otherwise than revolutionary in their consequences; it is therefore, the part of wisdom that we take note of this situation and prepare ourselves to meet these continual attacks upon our fundamental law; to this end a better understanding of the Constitution is essential, for only by a proper study of the past can we hope to escape those errors which have led to the downfall of nations, or the destruction of liberty and as Abraham Lincoln said in his great speech at Cooper Union—"If we would supplant the opinions and policy of our fathers in any case, we should do so upon evidence so conclusive, and argument so clear, that even their great authority fairly considered and weighed cannot stand."

Daniel Webster began his immortal reply to Senator Hayne with these words:

> When the mariner has been tossed, for many days, in thick weather, and on an unknown sea, he naturally avails himself of the first pause in the storm, the earliest glance of the sun, to take his latitude, and ascertain how far the elements have driven him from his true course. Let us imitate this prudence, and before we float farther, refer to the point from which we departed, that we may at least be able to conjecture where we now are.

The time has come when we of this generation should likewise imitate the prudence of the mariner, "and before we float farther, refer to the point from which we departed, that we may at least be able to conjecture where we now are."

Mr. Norton has supplied us with the chart which will enable us to take our bearings; we have "been tossed for many days in thick weather and on an unknown sea" and it behooves every lover of his Country to read and study this chart which the author has so well prepared for our use, for by doing so he will better appreciate the liberty which he enjoys and become more zealous in his determination to preserve the heritage which has descended to us from the fathers of the Republic.

JOHN T. RICHARDS.

State Government. By Walter F. Dodd. The Century Co., New York, 1922. pp. xiii, 578.—Dr. Dodd has produced an excellent book on "State" Government in the United States. He admits at the outset that, "In discussing comparatively the institutions of forty-eight states, a complete and detailed survey can not, in the nature of things, be given"; and that, "The picture in this volume is necessarily a composite, but it may aid each reader in obtaining a true picture of the government of the state in which he lives." That it certainly does, and much more—it introduces one into the philosophy and function of government in a way that is becoming increasingly popular among text writers, such as Haines and Haines "Principles and Problems of Government" (1921).

The subject matter in the present case, 48 states, affords good material for this method, and makes such an approach seem more natural to those used to the old descriptive and historical method, employed so largely in books like the standard Beard, "American Government and Politics" (1910, 3rd edition 1920).

One is struck by the careful analysis of facts, tempered by a high degree of fairness in conclusions and a choice of phrases pregnant with appreciation of the essential meaning of things: "No single head, and no single organization, is responsible for results in the administration of either civil or criminal justice. No adequate statistics are kept and no one knows how the whole machine of justice works. . . . Some of the difficulties caused by the lack of coordination of justice are occasioned by the separation of government into three departments, but material improvements may be made without constitutional change" (p. 345). "The judicial organization of the states still has its basis in the rural conditions of seventy-five years ago" (p. 339).

From Chapter I on "The Work of the State" to Chapter XX on "The Future of the State," the reader passes in review a treatment of the *current problems* of (1) the *relative* position of the State under our system of government—its place in the federal government on the one hand, and the place of its subdivisions in it on the other hand, (2) the legislature, (3) the executive, (4) the enforcement of state policy, including the administration side and the judicial side, and (5) special subjects, such as finance, elections, parties, and the initiative, referendum and recall. There is constant reference to the economic and social conditions of the complex industrial world we live in.

Dr. Dodd's practical experience is reflected in many places, but he is at his best in his discussion of constitutional problems, and this alone would be adequate reason for reading the book. There are also three special chapters devoted to the questions of the judicial system in our states, which are of especial interest to lawyers and judges. In addition to comment on the prosecuting officer and the public defender, Dr. Dodd has given brief mention to the legal profession (p. 327, 8) and the influence of the work of counsel on several subjects treated. This, it is believed, is a hopeful beginning of what no doubt will be given increasing attention in future works on government.

New York. EDWARD GLUCK.

Jurisdiction and Procedure of the Federal Courts, (2nd. Ed.), by John C. Rose, U. S. District Judge for the District of Maryland. Matthew Bender & Co., Albany, N. Y. $7.50.—The second edition of this excellent work is now in its second printing. Its outstanding merits are its concise, yet accurate statement of fundamentals, and the care with which the cases cited have been chosen. By giving only the leading cases and cases which are in point, the author marks

out a direct path to the heart of each question, leaving to the reader the task of multiplying authorities. Here is a worth-while task, worthily done.

Trade Union Law, by Henry H. Slesser and Charles Baker. Nisbet & Co., Ltd., London. 21s.—As time passes, the parallel between English and American experience in the development of the problems of labor relations becomes increasingly striking, as does the lagging character of legal regulation of these relations in America. This parallel makes English experience of increasing importance to American legislatures and courts dealing with questions affecting industrial relations. The book at hand is a moderately brief, but a fairly accurate portrayal of the English legislative and judicial attempts to solve some of the troublesome problems in the labor field.

Handbook on Companies, by Wm. K. Fraser and Hugh W. MacDonnell. The Carswell Co., Ltd., Toronto, $5.50.—This book is a brief and readable statement of the law and practice governing commercial companies in Canada. While intended as a popular guide for business men, it is useful to lawyers, since it contains so much factual material on so many points of corporation practice that are obscure to one trained in the law but not in business.

Inheritance Taxation, (3rd Ed.), by L. B. Gleason and Alexander Otis, Matthew Bender & Co., Albany, N. Y. $15.00.—With a federal inheritance tax statute and one in every state, except Alabama and Florida, yielding a total revenue of nearly two hundred million dollars, with about two thousand decisions involving inheritance taxation already handed down, the need for a comprehensive treatise on this subject is general. The third edition of this standard text supplies this need and will be welcomed by the profession because the changes in the statute law in this field have been rapid since the publication of the second edition in 1919. Thirty-four states have altered their statutes. The federal act has been changed and a new set of federal rules promulgated. Three years have produced over three hundred new decisions to be included in the present edition.

Accident and Health Insurance Law, by Myron W. Van Auken, General Counsel, The Commercial Travelers' Mutual Accident Association of America. Matthew Bender & Co., Albany, N. Y. $6.50.—The author has presented in this Ready Reference all the reported cases—stating clearly and concisely what the courts have held with regard to any particular casualty or cause of disability, and what they have declared to be "accident" as distinguished from disease. The topical index is designed to enable one to find quickly any case directly in point on a given state of facts. The book should prove useful to everyone who has anything to do with the subject of claims, for or against accident and health companies.

Why Wars Come, by Rear Admiral A. P. Niblack, U. S. Navy. The Stratford Co., Boston. $1.50.—Let these two sentences from its preface speak for this little book: "The Washington Conference, by reconciling most of the conflicting policies in the Pacific, did much to avoid future trouble in that particular area, but anyone who permits the loose reasoning and parochial omniscence of politicians to lull them into false security has only to examine the fundamental causes of war to realize that there are as many wars brewing in the future as there have been in the past since the causes remain. The world apparently learns little by experience and only asks to be allowed to go to sleep again for a while." This book should be read and loaned to friends to read.

Results of the Conference on Limitation of Armaments. Proceedings of the 9th Annual Meeting of the National Institute of Social Sciences. F. W. Faxon Co., Boston. $1.50.—In about one hundred pages are given the discussions of the subject by William C. Redfield, Otto H. Kahn, Talcott Williams, John Henry Hammond, James C. McDonald and Emory R. Johnson.

Old Europe's Suicide, by Brigadier-General C. B. Thomson. Thomas Seltzer, New York. $2.00.—The author, who was the British military representative in the Balkans from 1915 to 1917, covers outstanding events from the first Balkan War in 1912, to the year 1919. The causes of the World War he finds forged from the Balkan War, due to the selfishness of the Central Empires and of Russia, coupled with the ignorance and inertia of England and the vacillations of the Latin states. An excellent description of the conduct of the World War in southeast Europe is followed by a criticism of the Paris Conference, where, he says, "the delegates preferred the prospect of immediate gain to laying the foundation of a new and better world." Of the many books on this general subject, this one is among those which will repay the reading.

The Nature, Functions and Underwriting Requirements of Surety Bonds, by Edward C. Hunt. The Ronald Press Co., New York. $2.50.—The author is vice-president and head of the bonding department of the Fidelity and Casualty Co. of New York. The book contains a non-technical discussion of the functions performed by, and the risks involved in the writing of, the numerous kinds of surety bonds. Surprise at the extent to which the suretyship relation has been commercialized (in no bad sense) and at the enormous scope and hence importance of such business awaits the reader of this book.

II. Current Law Journals

IN an article entitled "Administrative Boards and Commissions: Are the Jury Trial Rules of Evidence in Force for Their Inquiries?" which appears in the *Illinois Law Review* for December, Dean John H. Wigmore suggests that "most courts and lawyers are apt to assume too readily that without that system of rules the truth cannot be reliably reached"; and, while not inquiring whether the results of his investigation of the topic "can be explained without impairing the credit of that system," he reaches the conclusion that "on the whole . . . the vast body of disputed claims and charges, dispatched monthly and yearly by these numerous cohorts of administrators in varied fields, manage to get adjudicated satisfactorily without enforcement by the courts of the jury-trial rules of evidence."

Mr. William Brown Hale, of the Chicago Bar, and Member of the Illinois State Board of Law Examiners, urges upon his State the adoption of the standard requirements for admission to the Bar recently recommended by the American Bar Association, in a very clear and convincing article in the *Illinois Law*

Quarterly for December, 1922. The article is headed "Illinois should adopt the Recommendation of the Conference of Bar Association Delegates," and while it deals specifically with the situation as it prevails in Illinois, contains many considerations which apply equally to all states, and will be found helpful in a most practical way to all who are interested in securing higher standards for admission to the bar.

In "Federal Police Regulation by Taxation," appearing in *Virginia Law Review* for December, 1922, Mr. Joseph R. Long, Washington and Lee University, takes "a survey of the course of constitutional history" culminating in the recent decision by the Supreme Court holding the Child Labor Tax Law to be unconstitutional. (Bailey v. Drexel Furniture Co., 42 Sup. Ct. 449). "This decision," says Mr. Long, "brings to a halt the attempt to use the federal taxing power as a substitute for a general police power, an attempt which, if successful, would have revolutionized our constitutional system by practically wiping out the sovereignty of the states." A wide reading of the article will go far toward clarifying the confusion which prevails in the minds of advocates of Child Labor legislation, and which is manifesting itself in widespread criticism of the decision.

"Rights in the Foreshore" is the title of a detailed examination of those rights by George Sanford Parsons in *Columbia Law Review* for December, 1922. The same journal publishes the lecture notes of the late Prof. Willard Barbour on the first of a series of lectures on English Legal History with special reference to the Development of Rights Through Procedure, which the author was delivering at the time of his death. While the notes are more or less fragmentary, they are sufficiently full to give the author's thoughts on the value and meaning of legal history, and kindle a deep feeling of regret that the entire course of lectures are not available.

California Law Review for November has an interesting article by Dr. Edward Huntington Williams and Dr. Ernest Bryant Hoog, Psychiatrists of the Los Angeles Superior Courts, upon "Misconceptions of Insanity in Jury Trials." They make out a strong case to support their theme that "the result of our archaic method of permitting lay juries to pass judgment on a question of insanity is in fact a travesty of justice."

Students of jurisprudence will be particularly interested in an article by Prof. Eugen Ehrlich upon "The Sociology of Law." The article is translated by Nathan Isaacs, and appears in *Harvard Law Review* for December, 1922. The same journal contains a very interesting history of "The Lex Murdrorum," by Hessel E. Yatema, Columbia Law School.

Under the title "Cases Arising from Bank Liquidation in Massachusetts," John E. Hannigan, in *Boston University Law Review* for October, 1922, begins a discussion of numerous legal questions, some of novel impression, arising out of the closing of four large Massachusetts trust companies during the years 1920 and 1921.

Minnesota Law Review for November, 1922, is devoted to the proceedings of the 1922 meeting of the Minnesota State Bar Association, but lawyers everywhere will be glad of the opportunity to read "Development of the American Constitution under John Marshall," by Alfred J. Beveridge, which appears therein.

The Hohfeld system of legal analysis is warmly defended against recent attacks upon its soundness in three articles appearing in *Illinois Law Quarterly* for December, 1922, towit: "Relations, Legal and Otherwise," by Charles E. Clark, Yale University Law School; "Negative Legal Relations Re-examined," by George W. Goble, University of Illinois Law School; and "What Is a Legal Relation?" by Arthur L. Corbin, Yale University Law School. The system is further demonstrated by its proponents in comments upon questions presented by the leading articles in the *Yale Law Journal* for December, 1922.

International Law Association

The Annual Meeting of the American Branch of the International Law Association will take place in New York City, on Saturday, January 27, 1923. There will be an afternoon session held in Hamilton Hall, Columbia University, at which a number of important subjects of present international interest will be discussed. The following papers are already announced:

"The Hague Rules of Affreightment, their Origin and Present Status" by Charles S. Haight, of New York.

"Commercial Arbitration in its International Aspects" by Julius Henry Cohen, of New York.

"The Growth of International Legislation through the League of Nations" by Prof. Manley O. Hudson of the Harvard Law School.

"The International Conference of Buenos Aires" by Arthur K. Kuhn of the New York Bar.

The meeting will be followed by a banquet at the Hotel McAlpin in the evening, at which prominent members of the Bench and Bar will speak. Members of the Bar and their guests (including ladies) are cordially invited to attend. Applications may be made to Arthur K. Kuhn, Honorary Secretary, 120 Broadway, New York City.

Associate Justice Pierce Butler

We are indebted to Hon. W. A. Hayes, of Milwaukee, a well known member of the Association, for the following interesting characterization:

"A judge of the Supreme Court of the United States should be a superior man. Pierce Butler is such. Nature gave him a fine physique, health, strength, and a commanding personal presence. Fifty-six years of temperate living, well directed industry, straight thinking, and devotion to duty have consummated the development of his splendid powers and made him a prince among men. He is a noble example of Emerson's aphorism that 'success is constitutional.'

"He is a man of broad views, liberal tendencies and kindly disposition. His mind is analytical, clear, strong, constructive, and wholly free from sophistry. Vanity and pretense are foreign to his make-up. He never seeks to appear that which he is not. His professional career has been conspicuously clean and marked by adherence to honest methods and the employment of legitimate means. Take him all in all, he is a physically, mentally, morally and spiritually a superior man, and an excellent lawyer. He possesses every quality required for eminent public service, and the country is fortunate in his appointment."

POLITICAL AND ECONOMIC REVIEW

A "Living Wage" and the Distribution of Wealth

IN *The Survey* for December 15, Robert W. Bruère attacks the Labor Board's repudiation of the "living wage" doctrine. No exception can be taken to his statement of the tragic consequences of wages which fall short of the standards in question—consequences rather callously laughed aside in an editorial in the *Stone & Webster Journal* for December. As the latter, however, points out, the extent to which it is possible to avoid these consequences can be determined only by raising the whole question of the fair apportionment of wealth. That the living wage question has complications is recognized by Mr. Bruère, who makes a rather vague suggestion that social workers cooperate with technical specialists in working out a commodity budget for the railroads. Having raised the question of distribution, the *Stone & Webster Journal* proceeds to solve it to its own satisfaction by saying that what the worker concedes to the employer and to the seller of goods, when he bargains with them, is no more than what their concessions to him are worth. Inasmuch as the true question is, whether the employer and the seller of goods should be vested with the full economic power over the worker which results from their law-given property rights, it is rather idle to justify the fruits of the power by proving that they are indeed the fruits of the power. Highwaymanry can be justified equally well: what the victim gets by having his life spared is doubtless worth all that he paid for it. Yet the fact that the life is worth the money scarcely justifies highwaymanry. The income which the property owner can collect by threatening to have the law shut the worker off from certain vital activities in connection with material objects, is to be justified on totally different grounds.

Incentive and Value

This the *Stone & Webster Journal* proceeds to do in another editorial (entitled "Value") in the same number. "Under economic law" (i. e., where not disturbed by rate regulation and the like) "the real value of any industrial enterprise is automatically based on the incentive of those controlling the enterprise to start or remain in business." Where the value of property is indeed so based, the justification of the owner's power is not difficult. But is there any such automatic adjustment? The article picks and chooses those elements in orthodox economic theory which favor its conclusion, omitting those which refute it. Exchange values conform to costs (to incentive) in orthodox theory only in the case of those things the supply of which can be altered readily, at unit costs which do not increase with the quantity, and where there is competition. It is only through changes in the supply that prices are supposed to adjust themselves to costs. Franchise values and land increments (to mention but two) are capitalizations of the power to extract from consumers prices above costs (including in costs the interest needed to call forth the actual investment). The incentive argument meets only a part of the case against the full economic power which property owners possess.

"Equal Rights" and Diplomacy

Our State Department is still crusading for equal rights before the law in foreign—particularly backward—countries. "Of course it is the duty of American diplomacy," says Frederick Simpich, of the United States Consular Service, in *The Nation's Business* for December ("Our Dollars Go Guarded Overseas"), "to protect and support American business abroad, and to fight for equal opportunities for American investors." But property rights at home are not equal in any important sense; nor is the opportunity to acquire them equal; some get title by direct action of the law (as in intestate succession, or governmental grants), some have to buy title at a price. It is only the procedural rights which protect the primary rights that can by any stretch be called equal. Yet it is the primary rights which most matter, and they are grossly unequal. The inequalities are the result of legal arrangements, which are the products of government—our own governments. If some backward government has arrangements whereby an English company gets property rights superior in economic value to those which any American possesses there, is our government to substitute its own unequal legal arrangements for those of the native country? If so we get strife and inequality. If not, is a government representing a handful of people to be the final arbiter between important interests of unrepresented foreigners? In that case we have minority rule with a vengeance, with a very probable curtailment of the world's production, and with no less inequality. There is no simple way out, in our present anarchic overlapping of governmental authority. And there is no simple way of escaping that anarchy. The State Department's attitude oversimplifies the matter dangerously.

Incentive and Inequality in Priority Rules

A certain degree of inequality of property rights seems essential if the pecuniary incentives to production are to be maintained. Where competition, however, is insufficient to keep the owner's income down to the level needed for incentive, and where at the same time no question of "legitimate expectations" is involved, it might be thought desirable to alter the economic effectiveness of the property right either by taxing the surplus income or by regulating the prices which the owner may impose. In the latter case we not infrequently meet a situation where, at the lowered price fixed by law, the demand for the service exceeds the amount which can be furnished. There will then arise a new inequality in the legal positions of individuals—inequality between those who are permitted to buy and those who are shut out. Equality can be established in some cases by appropriate priority rules, but this equality is at times undesirable—as in the famous Indiana case where the court ordered a natural gas company to supply all equally, though the result was that nobody could obtain a supply sufficient to be of any benefit. Priority rules might well be devised in many cases, not to secure equality, but to favor certain uses of the service (as in the familiar war priorities), or (like some of the justifiable inequalities in property rights) to stimulate the most efficient production of other things. According to H. A. Haring ("Coal Supply and Car Supply," *The Annalist*, November 27), the apportionment of cars to coal mines, while it has prevented such gross favoritism and corruption of railroad officials such as formerly prevailed, has erred by discriminating in favor of the small mine instead of against it, thus preventing the larger mines, which are potentially the most economical, from being

worked to full capacity during times of scarcity, because of car shortage. It is to this fact that the writer ascribes the paradoxical combination of high coal prices with potential overproduction of soft coal.

A Realistic Defence of Capitalism

Dr. R. Estcourt's defense of capitalism ("Conscription of Wealth a Fallacy," *The Annalist*, November 20) is enough to send the shivers down the spines of those who propound the Pollyanna version of capitalism as a system of "equal legal rights" and "no class legislation." He defends it on its own merits, though with a somewhat pedantic insistence that his own unusual definitions are the only ones which are not arbitrary. Note the following quotations from this article published by the New York Times Company! "Property is the essential ingredient of civilization and progress. Economically regarded, it is 'the capitalized value of the power—however acquired—of appropriating to one's personal use some portion of the value produced by the exertions of others, without any legal obligation to render any personal service in return.'" Again; "A true State implies the existence of a ruling class, supposed to render services to justify a first claim on economic rent and, in later days, on surplus value. A State without a ruling class is like an army without officers. The immediate result of the formation of an economic State is the addition of classes that minister to the service and enjoyment of the ruling class in art, literature, science, philosophy and religious ritual. These must all be maintained out of the same fund. Private property arises out of the delegation of the collection of this fund to individuals on a profit-sharing basis, the individual being required to hand over to the State a fixed amount and allowed to retain the residue of the yield. Out of this process arises the capitalist or entrepreneur, who is employed by the revenue farmer to exercise ingenuity in increasing the revenue bearing fund. Whether the income be obtained from obvious economic rent and surplus value or from the sale of the raw material of the State, the function is a delegation of sovereign power and, therefore, a franchise, and the franchise is the basis of all property income." This is refreshing after the typical superficial discussions, radical and conservative. It may be asked whether the writer is fully aware that "increasing the revenue bearing fund" is not necessarily synonymous with increasing wealth; it might result from a change of circumstances such as would force the non-owners to pay more to the owners. One hesitates to ask, for the writer has his own definitions of "wealth" as well as of most other terms, and the question doubtless betrays ignorance of them.

Miscellaneous

Numerous articles which have appeared since early summer must be mentioned below without systematic arrangement or much comment.

Penology:—Harry Elmer Barnes, "The Evolution of Modern Penology" (*Political Science Quarterly* for June). George Bernard Shaw, "Down With the Prisons" (*Hearst International*, May). In an interesting review of the Cleveland Criminal Survey in *The New Republic* for August 30, Professor Walter Wheeler Cook urges that "the various city and state bar associations should see to it that the work so well begun by the Cleveland Survey is carried forward to completion" In "When a Child Kills." (*Survey*, November 15), Arthur W. Towne discusses whether jurisdiction over child homicides should be in the criminal or in the children's courts.

The constitutionality of the provision of the New York *Lusk Laws*, which requires that every private school secure a license, to be withheld if the Regents think the instruction proposed includes "the doctrine that organized governments shall be overthrown by force, violence or unlawful means," is discussed with great fairness by Professor Z. Chafee in "The Rand School Case" (*New Republic*, September 27). The provision does not, in the writer's opinion, violate the 14th Amendment, unless it be by not requiring "due process" on the part of the Regents—a defect which the writer thinks not cured by the court review, since a court has no greater power to reverse the Regents than to reverse a jury. Whether the failure to recognize Blackstone's distinction between "punishment by a jury and censorship by an official" can be reconciled with the free speech clause of the state constitution, the writer thinks extremely doubtful.

The recently defeated *Illinois Constitution* is the subject of a brief editorial in *The Survey* for December 15 and of an article by Professor Ernst Freund in *The New Republic* for December 13.

The *Child Labor Decision* was discussed unfavorably by Professor Edward S. Corwin in *The New Republic* for July 12, and favorably by Professor Felix Frankfurter in the same journal for July 26, and by Professor Thomas Reed Powell in the course of a characteristically clear and realistic article, "The Supreme Court's Review of Legislation in 1921-1922" in the *Political Science Quarterly* for September.

The economic dogmas enunciated by the District of Columbia Court of Appeals in holding the *women's minimum wage law* unconstitutional, come in for severe but not unmerited criticism in *The New Republic* for December 13.

The *Coronado Case* and its interpretation is the subject of discussion in *The Survey* for June 15 and for August 16 between Professor F. B. Sayre and Mr. Gilbert H. Montague. Professor Felix Frankfurter in *The New Republic* (August 16) contends that the decision is in fact favorable to labor unions, partly on the ground that the liability of unions for legal damages removes the justification for injunctions. The same journal opposes labor injunctions editorially (September 27) on the ground that the acts restrained involve disputed questions of fact. "The traditional Anglo-American method for ascertaining such facts is a jury."

The Supreme Court's Personnel. Abraham I. Harris and M. H. Hedges (both of the Minneapolis *Star*) contribute unfavorable accounts of the career of Pierce Butler to *The New Republic* and to *The Nation*, respectively, both for December 13. The chief criticism is for an alleged intolerance of opinions unfavorable to corporations. *The New Republic* for December 20 follows with an editorial ("Pierce Butler and the Rule of Reason"), in which it expresses fear that such appointments will undermine the faith of the people in the necessity for judical review of legislation—an institution which it believes to be "perhaps the most valuable feature of American government." In advocating the appointment of young men to the Court, as likely to be more in touch with current economic conditions, Walton H. Hamilton ("The Ages of Justices," *New Republic*, October 11) presents some very interesting facts as to the age of the judges at various periods in the Court's career.

ROBERT L. HALE.

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ASSOCIATION OF AMERICAN LAW SCHOOLS

Largest Meeting in Its History Was Held at Chicago on Dec. 28, 29, 30—Improvement of Curriculum and Carrying Out of Letter and Spirit of Washington Legal Education Conference Were Among Principal Matters Discussed

By NATHAN ISAACS
Professor of Law, University of Pittsburgh

THE largest meeting of the Association of American Law Schools ever held, one in which forty-seven of the affiliated schools and a goodly number of unaffiliated institutions took part, was held on the closing days of the year at the LaSalle Hotel in Chicago. The law schools have now fully recovered from the depletion suffered during the war. According to an unofficial count that was circulated at the meeting, there are now over 32,000 law students registered in the United States.

Two central themes seemed to occupy most of the attention of the members during the business sessions, and echoes of one of them were heard in almost all of the round table conferences. The first was the improvement of the curriculum; the second, the carrying out of the spirit as well as the letter of the resolutions of the American Bar Association and of the Conference called last winter in Washington at its instance. Each of these interests revealed at times rather curious tendencies in the development of legal education.

It was astonishing, for example, to many of those who had attended the sessions in years past to see how easily the doors were opened for the admission of night schools. Through a long process, night classes had first been frowned upon and gradually eliminated from the Association. In 1919 it was decided not to admit schools conducting night classes. In 1921 a resolution to reinstate them under certain conditions was lost. Pursuant, however, to the spirit of resolutions of the Bar Association, and perhaps not without consideration for the conclusions of the Carnegie Foundation, a constitutional amendment has now been adopted by the Association of American Law Schools, making it possible to admit part-time schools requiring the same amount of work preliminary to graduation and enforcing the same standards as those required of other schools for admission, library, full-time instructorships, and other details. What makes this decision all the more curious is the fact that it came as a purely academic one. No school of the type described was directly seeking admission. So far as the meeting was informed, no part-time school of the type described exists anywhere in the United States. The resolution must, therefore, be looked upon primarily as an invitation issued by the Association to part-time schools to improve in respect to entrance requirements, library facilities, full-time instructorships and all other measureable details so that they may in time be welcomed into the Association.

As to the curriculum, the opening shot was the paper of Judge Cuthbert W. Pound of the Court of Appeals of New York, read in his absence by Mr. Woodward, "The Law School Curriculum as Seen by the Bench and Bar." In the paper and in the discussion by Professor James P. McBaine and Judge Charles M. Hough and others, the complete list of ordinary subjects taught in the average law school was analyzed, and with it was compared the almost equally imposing array of extraordinary subjects taught in graduate courses or occasionally as electives in schools peculiarly situated in one respect or another. These include today Administrative Law, Admiralty, Bankruptcy, Commercial Law of Spanish America, Conflict of Laws, Constitutional Law, Copyright Law, Federal Practice, Fundamental Concepts and Classification of the Common Law, History of European Law, Insurance, International Law, International Law Problems, Jurisprudence, Labor Law, The Law and Social and Economic Problems, Legal Bibliography and the Use of Law Books, Legal History, Legislation, Medical Jurisprudence, Mining Law, Modern Civil Law, Modern Criminal Science and Criminal Law, Modern Developments in Procedural Law, Mortgages, Municipal Corporations, Patent Law, Preparation for Trial and Trial Practice, Public Service Law, Public Utilities, Roman Law, Taxation, Trade Mark Law, Western Water Rights and Irrigation Law. It is, of course, quite obvious that no three-year course can include all of these, especially when we concede that at least three-fourths of a three-year course should be devoted to the substantial branches of Law, such as Contracts, Torts, Crimes, Property, Procedure, Evidence, Damages, Equity, Bills and Notes, Sales, Insurance, Bailments, Agency, Partnership, and Corporations. As yet the idea of a fourth year in the course of all students has made no progress outside of the school in which it originated (Northwestern University) and even the fourth year leading to a higher degree has hardly made any appeal outside of the teaching branch of the profession. One point has thus gradually become clear, that law schools and law students must make their compromise with necessity and be satisfied with a curriculum that is not all-inclusive. The problem as seen throughout this meeting was therefore no longer as in the past a question of the "right" curriculum or even of the "best" one, but of a "satisfactory" one.

The round table conferences* in many instances echoed the general discussion as to curriculum. In the first place, they recognize a kind of rivalry among the several subjects for a place in the law schools which was manifest, for example, in the Legal History section, where the question was frankly whether there is time for one or more courses in Legal History, or whether the acknowledged importance of the subject could be adequately met by scattering it throughout the other courses. In a very remarkable presentation before the section on Remedies of the function of Procedure in a law school course, Professor Edson R. Sunderland of the University of Michigan pressed the claim of Procedure on the very highest grounds,

*I am indebted to my colleague, Dr. G. J. Thompson, for notes on some of these sessions.

namely, that the use of Procedure was the greatest problem of legal ethics that presented itself to the lawyer. In one part of his paper, which by popular acclaim was re-read before a general session, Mr. Sunderland maintained that the rules of substantive law were fairly definite, but that there were no absolute rules to guide the lawyer in his choice of procedural instruments for the pressing of his client's claim, and that it was in this field that the most intolerable abuses of the law were allowed to thrive. In like manner in several other sections strong arguments were put forward for the inclusion of particular topics in the curriculum of every school.

In a few of the conferences a slightly different turn was given to the question of improving the curriculum. It was suggested, for example, in the conference on Commercial Law, that certain widely separated divisions of the law course could more economically and perhaps more effectively be considered together if only we import a sense of realism in the study of functions into every presentation. The papers read before that section by Professors Magill and Isaacs illustrated the point by arranging side by side first from a legal point of view and then from an economic point of view the various devices for safeguarding credit operations—*e. g.*, guaranty, suretyship, mortgages, trust receipts, conditional sales, pledges, *del credere* agency, consignments, and the like. In the rather lively discussion which followed it was suggested that some of these topics could well be taught together as a single course. By an interesting coincidence, the round table on Equity had before it as one of the principal topics "Suretyship and Mortgages—should these subjects be combined in a single course?" At the same conference in the general discussion something was said of scattering the parts of Equity, or at least of redistributing them among the several branches of the law to which they were related. It will be remembered that some years ago at one of these conferences Professor Walter Wheeler Cook had advocated and has since carried out a combination of the subject of Quasi-Contracts with that part of Equity which deals with reformation and cancellation of documents and rescission of contracts. It seems highly probable that part of the solution of the difficulties connected with the curriculum will be found in the direction of recombinations of the courses that have become staple.

On the other hand, new subjects are constantly making their claim for recognition. Particularly is this true of statute law, the teaching of which was the topic of the program of the round table on Public Law. Under the chairmanship of Mr. Ernst Freund, a pioneer in the teaching of Statutes as a subject of the law school, Mr. Walter F. Dodd discussed the workings of a legislative drafting bureau, and Dean Wigmore and Professor Harley of Northwestern Law School reviewed the experiments of that institution with reference to several approaches to the understanding of statute law; Mr. Arnold B. Hall of the University of Wisconsin, Department of Political Science, pointed out the vast number of purely political considerations that enter into legislative draftsmanship for which the lawyer has not and need not necessarily have any definite answer. Others discussed the topic from other points of view, suggesting four or five separate courses in a law school devoted to different aspects of the legislature's work. These courses, it was insisted, must be informational as well as disciplinary. When we consider the story told at this session to the effect that a quarter of a century ago Dean Langdell thought that the purchase of sets of statutes for the Harvard Law Library was unnecessary expense, it is clear that the place of statutes in our law is changing, or that the attitude of the law school on the subject has moved forward, or, more probably, that both processes are taking place.

Not only was the law school curriculum proper passed in review, but its relation to other parts of the university curriculum bulked large in the discussion. Mr. William H. Spencer of the University of Chicago discussed the correlation of law and college subjects. He was particularly concerned with administrative difficulties involved in the University of Chicago and possibly a few other institutions in which students in a college of commerce wished to attend sessions in a law school on subjects of importance to business men, such as Insurance, Public Utilities, Corporations, Partnership, and the like. Dean Harno, on the other hand, advocated the use of the college curriculum by law school students. The discussion from the floor in the main indicated an attitude not quite receptive of either step in the bringing together of the study of law and of other social or scientific studies. So far as the business student in the law school is concerned, he was denounced as something of a nuisance, likely to make himself even more obnoxious to the class than to the teacher. Perhaps all that was intended was to indicate the vast difference in the points of view of law students and of business students. An alternative plan was suggested: that law courses be conducted specially for business students in any subject needed by them. As to the mixture of non-legal subjects in a law student's course, the feeling was expressed by several that after a student was in the law school it was generally desirable to have him entirely under the control of the law faculty so far as studies were concerned and that generally the less he had to do with other departments of the college, the better for him. It will be interesting to watch the development of this question in the schools themselves and eventually in the future meetings of the Association in view of the fact that jurists of the Twentieth Century are rapidly giving up the Nineteenth Century water-tight compartments which so conveniently, though perhaps unfortunately, separated law from every other human interest.

Of outstanding interest was the report of the Committee on Juristic Center, read by Dean Harlan F. Stone of Columbia. This committee had been appointed some years ago "with power to invite the appointment of similar committees representing the courts, the legal professional bodies, and other scientific and learned bodies engaged in the study of substantive and adjective law and its administration, for the purpose of jointly creating a permanent organization for the improvement of the law." Such a meeting had been held and further steps had been taken for the establishment of such a juristic center. On February 23rd a conference will be held to which each school in the Association will be asked to send a representative. The plans of the committee involve a budget of $90,000 a year for the securing of which, it has been intimated, methods are now under way.

Dean A. M. Thompson of the University of Pittsburgh Law School reported for the Committee on the Recruiting of the Teaching Profession. It seems that a considerable number of schools wish to avail themselves of the information gathered by the committee in answer to the questionnaires sent to law teachers

throughout the country. It is thought that the Bar Association rule requiring at least three full-time men in each faculty will increase the demand for full-time instructors and that the information gathered by them and now in the hands of the publisher will be of great interest and considerable use to schools seeking to comply with the new requirements.

The following constitutional amendments were adopted:

1. Raising dues from $30 to $40. The increased funds, it is estimated, will be used in large part for the purpose of making inspections both of schools within the organization and of others desiring admittance to it.

2. A provision following the words of the resolution of the Conference of Bar Association Delegates to the effect that no school shall be elected unless it complies with the following requirement: "It shall be a school not operated as a commercial enterprise and the compensation of any officer or member of its teaching staff shall not depend on the number of students nor the fees received."

3. The length of the school year was defined as a minimum of thirty weeks and three years, comprising 1080 hours of class room instruction, were set down as the minimum length of a course for the first degree.

4. A strict limitation on special students who enter schools in the Association not as candidates for degrees was set. "After September 1, 1923, students who enter with less than the academic credit required of candidates for the law degree by section two of this article (six) must be twenty-one years of age, and the number of such students admitted each year shall not exceed ten per cent of the average number of students first entering the school for the two preceding years.

In a measure these resolutions offset any suggestions that the new attitude toward night schools may contain of a willingness to lower standards of scholarship.

The executive officers for the coming year are Henry Craig Jones, President, and Ralph W. Aigler, Secretary-Treasurer.

Numerous invitations were received by the Association for next year's meeting. That from St. Louis was connected with the expectation of the Washington Law School opening a magnificent new building at the time of the next meeting. The representative of McGill University extended an invitation to come to Montreal. The cordiality of the representatives of the two schools in Chicago has done much in the past to make of these annual meetings enjoyable occasions. Unfortunately, however, the hotel facilities of Chicago are growing more and more inadequate to meet the needs of the numerous conventions that convenient location and hospitality of residents bring to that city during the winter holidays.

THE BEHAVIORISTIC BASIS OF THE SCIENCE OF LAW—II

By G. H. T. MALAN

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(*Continued from Dec., 1922, issue of Journal*)

4. *The Evidence of Intention.* America, we presume, is as full of Law-Courts as any other country. America, too, is the home of the behaviorist who is, so to speak, indigenous to the country. It is, therefore, not a little remarkable that in expending all their ingenuity on devising standard problem-boxes for the control and study of behavior the fact should entirely have escaped the notice of Behaviorists that the Court of Law is the most ingenious problem-box ever devised for the control and study of behavior! The sides and passages of this human problem-box are not, except figuratively, the maze of aisles and passages leading from the dock in the Courtroom to the prison-house and the street, nor is the problem set the prisoner in the dock how to escape by avoiding the turnings which land him in a prison-cell. The technique, as is to be expected, considering the human subject of experiment, is of an entirely different character. A trial is an experiment, under certain set conditions, for purposes of a critical study of a response indicated in advance in the plea, say, of "not guilty." The chief of these *conditions* are the facts which constitute the evidence, and which are judicially noticed (especially the laws), the main *controls* are the charge and the case constructed from the evidential facts by the prosecution in proof of the charge, the *response* is the case for the defense in disproof of the charge, while the verdict (if any) and the sentence merely give the result of the response, merely register, so to speak, its success or non-success. These, "facts of evidence and of judicial cognizance," "case against," "case for," "sentence," are all of them factors which differ from their equivalents in most animal experiments in being factors of pure "significant content" or "meaning." None of them can be *sensed*. This purely significant character of a trial-at-law perhaps partly accounts for its neglect by Behaviorists. So much is it an affair of significance only, that the response may be delegated to an agent, namely, a counsel who conducts the defence; and that the accused need often not enter into the witness-box at all. The behavior under investigation is, in fact, largely impersonal or vicarious, a type very common in legal transactions. A further reason for the neglect is, perhaps, the involved nature of a trial which is, in fact,

*The law is widely based on psychological factors, and any change or development in the science of Psychology has a profound significance for Jurisprudence. The treatment of these factors has heretofore been in terms of Introspective Psychology, which was everywhere unchallenged until within the last two decades. However, the new Behavioristic Psychology has profoundly affected the world of psychological thought and thus has modified thinking in other social science fields, notably those of sociology and history. This article, so far as the JOURNAL is informed, is the first word on the question: "How will the new psychology when applied to law affect our notions?" This study was undertaken by Professor Malan at the request of the JOURNAL, and what it may lack in clearness to readers who have not been thinking along these lines is due to the partial obscurity of all philosophical discussion, and, more important, to the fact that the author is trying to strike out along new paths.

always a complex experiment comprising a number of minor experiments. Thus the examination of each witness is a part-experiment of its own. The witness himself is now the subject experimented on, the questions of counsel, etc., are the controls and the testimony of the witness is the response. Simplification is so far introduced in that behavior of the vicarious type is reduced to a minimum. For by the rule of best evidence, hearsay testimony is excluded (as far as possible), the only testimony admitted being such as is delivered from the witness-box.

It is one of these minor experiments which we propose to examine very briefly in this section. To bring out the behavioristic nature of the procedure in the clearest way we shall suppose the accused himself to be in the witness-box, and that the *factum probandum* is whether an act which accused confesses to having done was done intentionally. Accused, we shall suppose, was and still is very vividly aware of his volitional state of consciousness; his plea, however, is complete absence of intention. Now, if one is to believe learned writers on the subject of intention, the aim of the prosecution, with full consent of the court, is to prove the guilt of the accused *by proving the existence of the denied state of volition in the latter's mind*. But a moment's critical reflection shows that this cannot be and never is the primary, essential ground on which the court is justified in convicting. For as the accused stands there facing the members of the Court he only exposes, and can only expose, to their senses his external body and its movements, not his inner consciousness. The only person who perceives his inner states is the accused himself *introspectively*, and he denies the existence of the state in question. Nor, of course, were the witnesses who were close observers of the act and conduct of the accused in any better position to pierce the physical veil. The mental state is wholly and solely a matter of inference from behavior and that alone, as the Court, suddenly realizing its behavioristic function, recognizes in telling the witnesses that, by the rules of evidence, they have merely to "state facts observed," that is in this case, what they observed the external conduct of accused to have been.

This brings us to the crucial question: Is it the *Jury's* and *Judge's* inference of the mental state that forms the logical ground which validates the sentence of conviction by the Judge. We answer decisively, No! On the contrary, the subjective intention is itself an inference from a prior inference as to the "objective intention," that is, the aim-and-object ("Zweck") of the accused's conduct. And since this latter is the sole and only possible ground of the subjective inference, it is the sole and only logical ground of the conviction. Unless the accused's behavior prior to, at, and subsequent to the act and in the witness-box has that unique and irreducible objective relationship to the act which we may term "aiming at it," there is no ground for conviction. "Aim," "end" (in the non-temporal, non-spatial sense of the term), or "purpose" (in the objective sense) is an objective relation unifying acts in a unique way, just as logical implication or sequence is an objective relation unifying acts in the unique way of ground and consequence, premises and conclusion. To repeat: There can be no independent intuitive inspection of accused's mind by Judge and Jury. The relation of aim-and-object which the act has to accused's whole behavior (admissions included) is thus the sole and only ground for conviction. It may also be used as the ground of inference to a mental state, but this additional inference, though not wrong, is supererogatory. Some people can form no conception of economic value except in terms of coin, just so many more people cannot apprehend a logical or an ethical ("axiological") relation except in terms of mental processes like, ideas, images, feelings, volitions, etc. But of such obfuscations the scientific thinker should beware!

So much for the juridical nature of the intention. What is the character of the *evidence* for it? We observed above, speaking in general terms, that the facts of evidence are of the nature of meanings (*"Objective,"* Meinong would have called them, or "propositions" as Russell has it). A closer analysis, however, is necessary to show precisely how far this is so. The greater part of the evidence obtained by the Court is usually described as "oral," that is, as "testimony." Now testimony, on analysis, consists of the two by now familiar factors (a) laryngeal speech acts, (b) meanings conveyed by the vocal sounds made by these acts. Of which of these two factors is the evidence constituted? *Ordinarily* most certainly not of the vocal acts. For the same fact may be conveyed to the Court by literally thousands of different phonetic acts, as evidence given in a foreign language and translated sufficiently proves. In truth, ordinarily so irrelevant are they in themselves that, were it not for their indispensable function as meaning-vehicles, no judge would ever permit the making of such speech-sounds in Court! The relevant evidence, on the contrary, are the facts testified to, and these are pure significations: They are not physical things which the Judge and Jury *there and then* sense with their eyes and ears but meanings, logical propositions which they apprehend abstractly.—Sometimes, however, the spoken sounds of the witness become relevant evidence of a quite important kind, but then, let it be noted, not as "oral evidence" or "testimony" but as "real evidence." We refer, of course, to what is more specifically called the demeanor of the witness (in our supposed case, the accused) in the box. His speech-sounds in response to the questions put him come promptly or hesitatingly, precipitately or in a routine way, or change from the one to the other mode of delivery according to the question. We ask, what is the nature of such behavior? It is an instance of what, in section 2, we called quasi-causal response, consisting of mechanical reflex activity elicited by meaning-controls. The demeanour in question is, in fact, nothing but the primitive, infantile seeking and avoiding reactions to which man so easily reverts when in difficulties. The Judge rightly regards such speech-demeanor as evidence, since it is nothing but a continuation in Court of the accused's original conduct.—At this point we have to face the problem of *classification*. Oral demeanour is an evidentiary fact, speech-signature as the mere conveyance of meaning is not. Now if we classifiy oral demeanour as real evidence, we cannot call the conveyed propositional evidence "oral," for speech is real. Similar, in the case of documents, the very marks on the paper may themselves be the evidence (as in forgeries) or they may be the irrelevant vehicles of evidence in the form of significant content. If the former is real evidence the latter cannot be called documentary, since documents are real. We obviously, want a term like "signified" or "significate evidence" to designate the class of non-real evidence. Secondary distinctions may then be made in both classes. A third primary class will, however, be found inevitable. A sign as such, we said, is not evidence. But this

is not always so as the case of pictures, copies or models produced in Court shows. Here the sign itself is a substitute for the entity which it signifies. Such evidence cannot be placed in either of the two other primary classes. But enough has been said to show the importance of a sound behavioristic method for the analysis of evidence.

5. *The Recognition of Customary Law.* In sectio 3 on the law and its sanction we studied the law as a rule made binding on individuals by the Court. In the present section we propose to study the law as a rule which has been received by the Court as binding on itself. The two questions are entirely distinct. The obligation resting on the Court to recognize and apply a rule as law is wholly different from the obligation which the Court imposes on the individual to obey the law. Thus, for example, both the Judge and the convicted murderer have to conform to the authority of the rule which prescribes death as the penalty for murder. The murderer conforms to the authority by mounting the scafford and losing his head; if the authority had the same relation to the Judge as to the murderer, he would have to conform in the same manner. But he does not. The criminal stands in a different relation to the authoritative rule from that in which the judge stands to it, which is but another way of saying that the kind of authority to which the criminal is subject is different from the kind of authority to which the judge is subject. This simple but fundamental distinction is introduced by writers on customary law in the disguise of that between the material or legal and the formal sources of law. The confusions and obscurities to which this scholastic phraseology gives rise we cannot here stop to point out. Suffice it to say, that when in this section we speak of authority or obligation we refer to the authority relative to the judge, not to the authority relative to the litigant. Behavioristically this authority functions as the control evoking in the judge a response to which we give the generic name of "recognition."

A behavioristic analysis reveals three important differences in the control with three corresponding differences in the mode of judicial recognition. (a) In the history of Law the difference between *lex scripta* and *lex non scripta* figures prominently. Now, since writing (or printing) is bodily behavior, this difference is a genuinely behavioristic one. Broadly speaking higher authority is accorded by the Courts to written law than to unwritten. The true reason for this is behavioristic. For the higher the authority of a rule the greater the necessity of its being clearly and logically expressed. By far and away the most accurate bodily expression of fine logical nuances of meaning is linguistic, especially hand-made symbols. Hence it is that rules of great authority are always, if possible, embodied in writing. Of course, writing is not on that account necessarily evidence of great authority as the existence of inferior commentaries shows. When, however, writing is the medium through which the authoritative rule presents itself, the latter determines a judicial response of a peculiar kind known as "interpreting" or "construing."—(b) A different recognitive behavior is elicited by *un*written authoritative rules *acted on* by a number of individuals. We refer especially to customs in so far as the rule of the custom has not acquired authoritative, written form in precedent. Let us provisionally call the recognition of a custom as a legal rule "adoption." To investigate the nature of this custom-control and of the adoptive response is the purpose of the present section. We may anticipate so far as to say that adoption is not to be regarded as "creative" of the customary law.—(c) We have, however, no great hesitation in describing as creative or inventive judicial recognition in connection with a third class of rules. We refer especially to the procedure anent those principles of equity which, on account of their general and abstract character, cannot without great difficulty be fully and unambiguously expressed by verbal acts, let alone other kinds of acts. Because of this lack of a behavioristic signature fully adequate to the abstract *ratio decidendi* in all its logical exactness, many writers deny this *ratio* any authority at all in determining judicial response. The contrary view they dismiss as the fiction of judicial incompetence to make new law. These ethical principles, we are told, are the original inventions of the judge who, as their author and creator, cannot without absurdity be said to be bound by them. Now, to argue from the absence or inherent defectiveness of the external signature to the absence of control is a palpable fallacy. In saying this we do not go the length of denying that cases may come before the Court, which are, in truth, so casuistic as to justify a complete *arbitrium judicis* in the invention of principles and as to nullify the categorical imperativeness or "oughtness" of the principle. But these cases are the exception. Ordinarily, the judge has not much doubt as to the proper ethical principle he has to apply, and whenever this is so there can be no uncertainty as to the form his recognitive response takes. It consists in inventing the proper verbal formulation of the principle, in framing a sentence to express it. In this sense the recognition can be truly described as creative or inventive. At the same time, it has to be admitted that the want of adequate expression derogates seriously from the authority of the principle as compared with that of all statutes and most customs. Tabulating (a), (b), and (c) for better comparison we have:

Authoritative Control.	*Recognitive Response.*
(a), *Verbal* formulae,	Interpretation of their meaning.
(b), Acted rules,	"Adoption."
(c), Non-verbal meaning,	*Verbal* formulation.

The particular fact which this table is meant to bring into relief is the opposite rôle played by verbal acts in cases (a) and (c) respectively, appearing in the former under the head of "control," in the latter under that of "response." In the case of statute the *ipsissima verba*, signifying some authoritative principle, are given and the judge responds by apprehending the principle in merely interpreting the words; whereas in the case of equity law the authoritative principle is given, and the judge responds by inventing the appropriate verbal expression.

The reason why we emphasize this antithesis is that it lies at the bottom of two fallacious theories as to the nature of customary law. Assuming the antithesis that one theory explains customary law by assimilating the custom-control to the control in case (a) above, to the verbal element in which the attitude of the judge is passive and receptive, the other theory explains it by assimilating it to the control in case (c), in which the judge is verbally creative. The latter theory is upheld by the Austinian school, which conceives customary law as simply a variety of case-law, that is, as nothing but the creation of the judges in leading cases which serve as authoritative precedents for subsequent decisions. A custom, it is maintained,

only becomes law *after* it has been judicially adopted, for the judge is not absolutely bound by it as he is by statute, and may defer to it or ignore it as he sees fit.[14] Opposed to this doctrine there is the equally unacceptable traditional theory which attributes to custom the authoritative force (though not the written form) of statute and assigns to the judge the corresponding passive rôle of acceptance. This view pervades the Romanesque, and more particularly the Germanic, legal systems, and is represented in its extreme form by the school of Savigny and Puchta. According to this view, customary law, unlike the verbal formulations of equity courts, is not an invention issuing from the *arbitrium judicis,* but an absolute authority to which the judge has to submit himself. We believe that the only effective exposure of the fallacies contained in these two views is by means of behavioristic arguments. By employing these we shall be able to show, on the one hand, that the school of Austin is right in denying to custom unrecognized by the judiciary the character of law in the judicial sense, wrong in concluding that, therefore, such custom has no, least of all absolute, authority for the court; and, on the other hand, that the school of Savigny is right in attributing authority, even absolute, to custom, wrong in his conception of the authoritative element in custom. The pre-valid authority of custom gets juridic character from the procedure of judicial adoption, because, being demonstrably behavioristic, this procedure is of a different kind from the socio-psychological processes by which custom is formed.

The Austinian tenets shall be the first to claim our attention. Custom has no authority for the judge, so it is contended. And why? Because, so it seems to us, mistaking the unalterable words of statute for statutory authority itself, this school argues from the absence of similar stereotyped expressions authoritatively defining custom to the absence of authority in such custom. But such an argument as this is specious. Words are ever but the existential signs that do not matter, of some meaning that does matter, and should not be confounded with the latter. Now we are prepared to grant that there is an element of truth in the view that the very words of statute are "a part of" statutory authority. From the standpoint of the judge such words are the non-substitutable signicative expressions of legislative authority. The alternative expressions which in ordinary discourse and in the legislature could have been employed to convey and amplify the same meaning are (for him), so to speak, *ultra vires.* The effect of making the enacted words non-substitutable is, on the one hand, to narrow the signified rule by denying authoritative force to amplifications and corrections derivable from cognate phrases, and, on the other hand, to broaden it by introducing into it the specific and contingent significations ordinarily attaching to the enacted words. In either case the principle which the legislators had in mind, i. e., in their clear consciousness (the *sententia logis*) is, to some extent, distorted by the tyranny of the behavioristic medium, the promulgated *literas scriptas,* through which it reaches the judges. The view under consideration is true if it means that promulgation is the differentia by which statute, the authority to which the judge bows, is to be distinguished from the authority (moral and political) under which legislators make laws. What is also true is, that the words taken apart from their signification are the only and exclusive statutory "stimulus" of the judge's vocal and subvocal reading reflexes. No judge will apply a statutory rule without having read the statute. But the chief authority of statute is situated in its meaning, in the principles signified and modified by the irreplacable words, which authority is the control eliciting the interpretative response, seen, e. g., in the judge expounding the law to the jury. But to argue that because, firstly, the words are the only statutory stimulus of the reading-response, and because, secondly, they are the *exclusive* expressive signs of a principle eliciting a significant response, therefore, they are an essential part of the principle signified is surely unintelligible. From all of which it follows that the fact of custom not making its appearance, sociologically speaking, amongst a people in stereotyped phrases is no detriment to its authority. We see no reason for not holding that many customs bind a judge, even in English law, as absolutely as any statute, namely, all those against which in a given case no relevant rule of superior authority, either in the way of statute, precedent, etc., can be alleged. As to the authority of statute, the rule that custom cannot abrogate statute, does not mean that the authority of any given statute is absolute (for it can be overruled by a superior statute), but that the priority of statute to custom is absolute or constant, which fact, however, does not preclude custom on occasions imposing an absolute obligation on the court. Custom, we conclude, as against Austin and in favor of Savigny, is a control, and even in certain contingencies an absolute control, of judicial behavior.

This brings us to the crucial question as to the nature of this custom-authority. Now, not only are there many customs which lack legal authority, but every custom is itself a combination of factors, some of which, though sociologically essential, are juridically irrelevant. We have to show, by an examination of custom, wherein, psychologically, the authoritativeness consists by virtue of which it obliges the judicial tribunal to adopt it as law. Two theories hold the field. The first, rather tacitly assumed than clearly expressed, is, as far as it goes behavioristically and, therefore, juridically correct, but the custom accounted for is, juridically, of secondary importance. The other theory, that of Savigny, is sociologically far more adequate, though juridically beside the point.

The first theory is the offspring of the ordinary psychological doctrine which denotes by custom or habit the automatism of life. None has devoted a more careful analytical study to habit than Watson.[15] We can here quote only his conclusions: "Any definite mode of acting, either explicit or implicit in character, not belonging to man's hereditary equipment must be looked upon as habit."[16] What, then, is habit? "We do not hesitate to define habit as we do instinct—as the complex system of [congenital] reflexes which function in a serial order when the organism is confronted by certain stimuli, provided we add the clause which marks off habit from instinct, viz., that in habit the order and pattern are acquired during the life of the individual animal [or man]."[17] Hence we must further ask what is the nature of this process of acquirement. "We shall be able to show in a convincing way that the mechanical principles [(1) of frequency and (2) of recency] . . . are sufficient to yield the

14. See W. Jethro Brown, *The Austinian Theory of Law,* pp. 313, 323.

15. Watson, *Behavior,* Ch. VI, et seq.
16. *Ibid, Psychology,* p. 240.
17. *Ibid, Behavior,* p. 185.

solution of the problems involved in learning or habit-fixation."[18] The outstanding trait of such a theory is its purely mechanistic character. Habit, on this view, is a mere automatic activity, not only mechanically formed, but, once formed, mechanically operated by means of external stimuli. Such, behavioristically, being the origin and nature of habit, what are its most general properties? We discriminate *inter alia* the following: (1) Necessity or certainty (whenever a given stimulus comes to be invariably responded to[19]); (2) uniformity (when, whatever the stimulus, the series of acts always has the same pattern[20]); (3) continuity or durability (a habit once ingrained leads *proprio motu* to persist); (4) preservative function (many habits have high survival-value, that is, are reasonable), etc. Since these are essential properties of habit, and, moreover, since the Court has to adopt and apply genuine habits, the possession of these properties by a habit will be the ground of its recognition by the Court. And this is what, as a matter of fact, jurists have to all intents and purposes maintained. Are we not all familiar with the lists, official and semi-official, and non-official, of the judicial tests of customary law?[21] And is not a casual glance sufficient to show that the above properties, or their equivalents, occur in all the lists?

Since this can hardly be denied, what follows as regards the legal character of the customs whose judicial adoption they determine? This, that though the judge recognizes these habits, *he does not recognize them as customary laws, as legal rules of conduct at all, but as "things" or "objects."* To contend that these habits are the customs which constitute the great body of the Common Law, simply means committing oneself to the absurd conclusion, that common law does not apply to voluntary transactions at all, or, that the "transactions" governed by common law are never free acts, but always mechanical habits. But, of course, the contractual acts of marriage, the acts of testamentary disposition, the acts of conveyance, etc., are deliberate acts. To describe them as happening automatically or not at all is to proclaim the nonsensical doctrine, that liability cannot be incurred under the rules of common law. Habits, therefore, of the defined type cannot be of the nature either of "rights," that is, of acts which a person is entitled to commit, or of "obligations," that is, of acts which another is entitled to exact from him. They can only fall under the legal rubric which comprises whatever is explicable by the mechanical laws of physics, namely, the rubric of legal "things," that is, of the objects over which rights can be exercised and with regard to which the duties may be imposed. This much is so far plain, that the judicial tests as they stand are worthless as tests of customary laws.

This brings us to the second theory. It is to the credit of the great genius of Savigny that he should, according to his lights, have seen and exposed the crude fallacy of the mechanistic theory of customary law. Briefly, he points out[22] that Gewöhnung, consuetudo, habituation, is a blind, illogical process started accidentally and fixated mechanically by frequent repetition, and that, therefore, it cannot be the cause or ground of Gewohnheitsrecht. And he states his conclusion in a sentence which has a remarkably up-to-date ring about it: "So ist also die Gewohnheit das Kennzeichen des positiven Rechts nicht dessen Entstehungsgrund."[23] The acts of habit are the signs, or, as he also says, the expressions, of customary law, not the authority creative of it. What, then, on his views is that authority? It is, he tells us emphatically, the common social consciousness. "Das Volksbewusstsein" is the real content ("der feste Kern") of customary law. Such a theory of social custom is at least nearer the mark than the mechanistic explanation. But how does it affect judicial practice? Savigny frankly admits that this social consciousness has only an invisible existence. The only way of gaining a direct acquaintance of it is by "unmittelbar Erkenntniss," that is to say, introspectively. Logically, it follows from this that the only tribunals fit to administer customary law are those constituted on the lines of the Old Germanic Schöffengerichte,[24] whose members drawn as they were from the community, had as partakers in the communal consciousness introspective acqaintance of its content. Unfortunately for Savigny, however, he is writing a book on "Das System des *heutigen* Römischen Rechts." He is well aware that by a curious piece of legislation Justinian in the sixth century forbade the adoption of any new customary law beside that authenticated in written form in the *Corpus Juris*. When, therefore, during the middle ages the Roman Common Law was revived and received all over Europe, the judges had before them only the dead letter of the Justinian manuscripts, from which the physical spirit had departed six centuries ago. But, if the only genuine sense and content of Gewohnheitsrecht is that contained in "das gemeinsame Bewusstsein des Römischen Volkes," then, with the passing of the Roman People must have perished irretrievably the civil law itself. The revival of Roman Law on such a mentalistic hypothesis implies the metempsychosis and reincarnation of the defunct Roman national soul in the physical bodies of the mediaeval Germanic and Frankish peoples. "The story I am to tell," says Vinogradoff in the first chapter of his *Roman Law in Mediaeval Europe*, "is, in a sense, a ghost story. It treats of a second life of Roman Law after the demise of the body in which it first saw the light." Surely a *reductio ad absurdum* of the subjectivistic theory!

If, as we have now seen, the legal authority of custom is situated neither in its bodily nor its mental factors, where has the judge to look for it? We shall be able to arrive at an answer by observing, first of all, that custom or social practice is not necessarily mechanical or automatic. Now habit is necessarily that, if we adopt the current behavioristic conception of habit as bodily movement or disposition which is the result of repeated stimulation of the same set of plastic nerve tracts and muscles.[25] Since, therefore, this is the origin of habit, and since there is no such thing as a supra-individual communal brain, it follows that habit is an ontogenetic or individual, not, like custom, an autogenetic or collective activity. Consequently, to originate a custom there must be repetition of some act by *different* individuals. That is to say, a custom depends not, as a habit does, on the number of *times* an act is repeated, but on the number of *individuals* who repeat it. And, since this is so, there is no reason why the acts constitutive of a full-blown custom may

18. *Ibid, Behavior*, p. 202.
19. So called "sensory habit."
20. So called "motor habit."
21. *System des heutigen Römischen Rechts*, Vol. 1, p. 145.
22. Ibid, p. 35.
23. Ibid, pp. 45, 149.
24. Cf. W. James, Principles of Psychology, Vol. I, Ch. V.

not always be deliberate and voluntary. Thus, for example, if every member of a community in a position to do so, should for a few generations make a will or marry in a certain way *once only* in his lifetime, a social custom would at length become established though no individual would contract a habit. Of mechanization there is here no question. We said that custom is not "necessarily" mechanical. But is custom *ever* mechanical? We answer by a counter query. May there not be customary mechanical interaction between individuals? Is imitation e. g., not capable of operating instinctively at the organic level? The language of Keller [25] in interpreting Sumner's conception of a "folkway" would seem to suggest such a view. Folkways are "some sort of simple and habitual, unconscious, automatic, unpremeditated reactions upon surroundings . . . and represent the lowest terms or matrix of the institutions whose aggregate [is] civilization." . . . . Unfortunately, Keller forthwith proceeds to treat folkways not as automatic at all, but merely as unregulated. A truly automatic folkway would, in the legal system of the people, figure exclusively under the head of legal "things."

The result, so far as the argument has gone, is that the custom of which the judge takes cognizance consists of acts performed with conscious volition. Does it not, therefore, follow (with Savigny) that it is the "consciousness" which the judge recognizes as authoritative? By no means. And a simple example will make this plain. Amongst the rights of personal freedom there is that of walking. Why does the law recognize my right to walk? Because it is a social custom: The members of the community have been walking for ages. But the Law cannot possibly recognize walking as a right because of any conscious constituent, since, as a matter of fact, walking is for the most part an unconscious, though very intricate feat. It is so recognized, to speak subjectively, because the individual can control it at any moment he consciously wills to, that is to say, at any moment the walking does not express *what* he wills. And this is just the point: The walking is capable of expressing a "what," though not (sect. 2) the conscious willing act itself. From the standpoint of the external observer, which is that of the judge, communal walking can be recognized as a ground of rights and duties, not because it is conscious, but because (a) it is *expressive* (even though unconscious) (b) it is expressive of an *aim-and-object*. More specifically, the judge recognizes a legal rule of walking on the ground of its (walking) logically presupposing an ascertainable end, by which it is determined a priori. He may be told by the introspective psychologist that acts are purposive only because they are in some way willed. He, for his part, can only decide that this particular behavior here is purposive because, consciously or unconsciously, it explicitly expresses a recognizable purpose ("Zweck"). Of all the authoritative judicial tests of customary law this "logical" one of expressed aim-and-objectivity (if the term be allowed) is the most important and conditions all the rest. Of it, universality, continuity, stability, etc., are to be understood as but the logical differentiations.

Perhaps we may claim that our discussion of the subjects of "sanction," "intention," "evidence" and "customary law" has made out a *prima facie* case for the possibility of a Behavioristic Jurisprudence. At the same time, it is our conviction that Behaviorism will have no success in dealing with the worth-facts of a normative science such as Jurisprudence unless it employs other than exclusively mechanistic and positivistic methods. A Behavioristic Jurisprudence will only be possible on the basis of a Behavioristic "Phenomenology" (in Husserl's sense of the term). In conclusion, it is hardly necessary to add that beside the legal topics here considered there are others simply begging for behavioristic interpretation. Think only of Ihering's doctrine of the "Besitzwille," and of the problem of consensus in contract, where the points at issue are glaringly behavioristic. Perhaps some behavioristic jurisprudent may be induced by this paper to give these problems the attention they merit.

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25. *Societal Evolution*, p. 31.

Legal Progress Follows Flag

New Rules for Examination of Candidates for Admission to Practice of Law in Philippine Islands

The Supreme Court of the Philippine Islands on September 28, 1922, amended the rules for the examination of candidates for admission to the bar, raising the qualifications required in several particulars.

Every applicant for admission on and after January 1, 1927 must file with the clerk of the Supreme Court a certificate showing that, before he began the study of law, he had studied in a recognized university or college of liberal arts, requiring for admission thereto the completion of a four-year high school course, for a period of two academic years, and that he had actualy pursued and satisfactorily completed the first two years of the course of study prescribed therein for a degree in arts or sciences.

Applicants who have not been admitted to practice in the courts during the period of Spanish sovereignty, or in the Supreme Court of the United States, or in any circuit court of appeal or district court, or in the highest court of any State or Territory of the United States, which State or Territory by comity confers the same privilege on attorneys admitted to practice in the Philippine Islands, and who have practiced five years in any of the said courts, are to be subjected to examinations in the following subjects: Civil law; land registration and mortgages; mercantile law; criminal law; political law, embracing constitutional law, public corporations, and public officers; remedial law (civil procedure, criminal procedure, and evidence); legal ethics and practical exercises in pleading and conveyancing.

Duly qualified applicants will be admitted to the examination as often as they present themselves therefor, except that any candidate who, taking all the examinations in any year, shall not obtain a general average of forty per cent., shall not again be admitted to the examination. A candidate presenting himself for a second or any subsequent examination will receive no credit on account of any of the subjects which he may have passed at a former examination, and will be required to submit himself to the new examination as if he were taking the examination for the first time.

The college of law of the University of the Philippines as well as the private institutions require a four-year course and so the foregoing provisions affect the entrance requirements on and after July 1, 1923, when the college year begins in the Philippine Islands.

PROBLEMS OF PROFESSIONAL ETHICS

"9. We believe that adequate intellectual requirements for admission to the bar will not only increase the efficiency of those admitted to practice but will also strengthen their moral character. But we are convinced that high ideals of professional duty must come chiefly from an understanding of the traditions and standards of the bar through study of such traditions and standards and by the personal contact of law students with members of the bar who are marked by a real interest in younger men, a love of their profession and a keen appreciation of the importance of its best traditions. We realize the difficulty of creating this kind of personal contact, especially in large cities; nevertheless, we believe that much can be accomplished by the intelligent co-operation between committees of the bar and law school faculties."

The foregoing is a copy of section 9 of the Resolutions of the National Conference of Bar Associations on Legal Education adopted at Washington, February 24th, 1922. The entire resolutions appeared in the March 1922 issue of the JOURNAL at page 137.

The older members of the bar must bear in mind that the youngsters coming forward each year, while they may possess necessary legal attainments and perhaps are known to be of good character in their respective communities, yet still lack accurate knowledge of the traditions of the profession. For example: Any young man of good character, whether a lawyer or not, knows that "no client, corporate or individual, however powerful . . . is entitled to receive . . . any service or advice involving . . . corruption of any person or persons exercising a public office or a public trust" (Canon 32), and will refuse to furnish such service or advice. But not every young lawyer knows it is improper for him, except as to merely formal or undisputed matters, to appear as a witness or even to act as notary public in a case he is conducting.

One of the most painful scenes we recall was that of a young man haled before a grievance committee of which the writer was a member. He had been caught "chasing ambulances." He pleaded that he never heard that it was wrong to get business that way; that he knew of a number of prominent members of the local bar whose practice consisted largely in personal injury cases, and whose "business" was procured through sending flowers accompanied by professional cards to persons injured or to the funerals of persons killed in accidents.

There is of course no statute prohibiting such practices; and after a searching examination of the culprit and a careful consideration of the circumstances attending the offense, the grievance committee came to the conclusion that it was a genuine case of real ignorance—and accordingly dismissed the young lawyer with a short but pointed statement of the standards the bar has fixed in these matters and of the estimation in which lawyers who descend to such practices are held. We never heard of any further violations by that particular offender; and it is probable that the offense was never repeated by him.

There are indeed so many slips which a young lawyer may make through ignorance, and not through immorality as generally understood, that it is worth while to list a few:

Carrying on negotiations with the client of the opposing lawyer instead of conducting them through the lawyer.

Acquiring an interest in the subject matter of the law suit the lawyer is himself conducting.

Asserting before a jury his personal belief in his client's innocence or in the justice of his cause.

Advertising or soliciting business by circulars or "by personal communications or interviews not warranted by personal relations."

Refusing to conduct the defense of a man charged with a crime because he entertains the personal opinion that the accused is guilty—especially in so refusing after such defense has been undertaken.

This list is of course far from exhaustive. It represents however some of the commoner pitfalls into which an inexperienced practitioner, though of personal good character, may fall; and thereby forfeit or impair his professional standing and his professional future.

The more experienced members of the bar owe to their younger brethren, do they not, just the "contacts" mentioned in the sections we have quoted from the resolutions of the National Conference of Bar Associations. If the older men are "marked by real interest in younger men, a love of their profession and a keen appreciation of the importance of its best traditions," then they will not sit back and wait until some unfortunate is brought before them to be presented to the courts for discipline by reason of his having violated some tradition or standard of the profession of which he has never heard. Miss Myra Kelly tells us that on the east side of New York the usual method whereby new-comers to this country learn its laws is by breaking them. Something of this happens to new-comers at the bar who have not what William Draper Lewis calls "an informed conscience."

Thus the practice in New York, in Illinois, and doubtless in other places, of seeing to it that each successful candidate for the bar is supplied with a copy of the American Bar Association Code of Ethics or of a local code, which usually amounts to the same thing, is highly to be commended; but in addition, as a New Year's suggestion, can any of us be found who will spend any time or effort in "creating a kind of personal contact especially in large cities" with younger members of the profession, and who will make it their business so far as in them lies to see that the youthful members of the profession acquire "an understanding of the traditions and standards of the bar?" Of course we mean nothing so insufferable as reading a moral lecture. What we have in mind is an informal acquaintance, friendship, an inquiry as to how the youngsters are getting their start, how they are progressing, how they expect or hope to get "business," how they are coming on with the courts, with juries and with clients; and whether they propose to attend meetings of lawyers, to take part in any concerted efforts to maintain the ideals of the bar, and to cooperate with any men and in any measures looking toward the maintenance of high standards of morals as well as of intellectual equipment for the profession.

RUSSELL WHITMAN.

LIFE AND TIMES OF EDGAR HOAWRD FARRAR

The Story of a Unique Character and Legal and Public Career Abounding in Interesting Activities Such as Helping Plan Organization of Tulane University, Fight Against Louisiana State Lottery, and Important Constitutional Arguments

By Henry Planche Dart
Of the New Orleans, La., Bar

EDGAR HOWARD FARRAR died on January 6, 1922. His career was such that the events of his life form part of the history of his times. The Committee is in accord that any memoir prepared for this occasion should keep this in view and should strive to reproduce the man as he appeared to his contemporaries. My colleagues have entrusted that duty to me, and I have been consoled in my labors by the knowledge that a portrait of our distinguished friend would be before us while we were discussing him here. It represents Mr. Farrar in his middle fifties, when he was in the plenitude of his powers; I believe there will be no question that it is a remarkably accurate reproduction and a perfect representation. Our interest in the picture is heightened by reason of the fact that it was painted by his talented daughter, Mrs. Anna Farrar Goldsborough, who has mixed her heart with the pigments, and love and skill have combined in a canvas that jumps to the eye and haunts the memory. Mrs. Farrar and her children desire the picture to remain here and I trust your Honors will accede to the request.

Mr. Farrar was the son of a country lawyer, born at his father's residence in Concordia Parish, Louisiana, June 20, 1849. His parents, Thomas Prince Farrar and Anna Girault, his wife, were people of consequence in North Louisiana. The father, both before and after the Civil War, was successful, stood high in his community and enjoyed a state-wide reputation for ability and integrity. He was also a man of genius, and if there be half a grain of truth in the legends of those days, he had as unique a personality as his distinguished son. The ancestral line counts three or four lawyers in direct sequence behind the father, and the family traces itself out of England into the earliest Virginia emigration and thence through the Southwest, and ultimately into Mississippi, where Mr. Farrar's father was born.

Edgar Howard Farrar received the rudiments of his education at home, went to Magruder's School at Baton Rouge, an institution that prepared many distinguished sons of Louisiana for higher education, and from Magruders to the University of Virginia, where he received his M. A. degree in 1871. He came to New Orleans immediately thereafter, entered the Law School of the old University of Louisiana (now Tulane), but abandoned it, and pursuing his studies in his own fashion, received his license from this Court in 1872.

There are many stories about Farrar that must await the arrival of his Boswell, but there is one that is pertinent, and very characteristic of the man. It is said he matriculated at the law school of the Old University of Louisiana and sat out some of the lectures. After disagreeing with the venerable professors on several occasions, he picked up his hat one night and announced his purpose to seek his license from the court. He devoured the prescribed course, and before the session was over posted his application with the Examining Committee. The professors caused the Committee to be advised of this secession of a bumptious young man, and intimated the necessity of a lesson and an example. The story continues (and we may take it with a little salt), that the chairman of the Committee afterwards reported to the professors that Farrar had not failed in a single question, and intimated they would be glad to see more seceders of that quality.

There are some of us who can remember Farrar at the beginning of his legal career. Of course, he was cast in the same mould and stature that he retained in his middle years. His mental characteristics were not appreciably different, including the explosive quality of his speech. When he was with you or against you in a case, you were more or less apprehensive that sooner or later he would lay violent hands on somebody or something, and while he presented his case at the bar in a more moderate fashion, it was always within the possibilities that something would happen. He did not leap into immediate success, and he utilized those starvation years, as he called them, and doubtless with sincerity, to study the reports of the Supreme Court of the United States and of this State case by case, and from beginning to end. He put himself into like relations with the Civil Law of Rome and France. He was the manner of man who could sit out the hours of the day and of the night at such self-imposed tasks. His prodigious strength was equalled by his mental endowment. His memory retained and his reason digested all that he read. And so he toiled on, poor in purse but rich in learning. He became in these lean, waiting years a legal athlete and when clients began to retain him, the judges were quick to discern that here was one of those indefatigable spirits who needed no adventitious assistance, who, on the contrary, could carry the incumbrance of his peculiarities and rise in spite of himself. But when all has been said, it was really a very great tribute to his astonishing mental equipment that success came so quickly to him.[1]

With the rising tide of his professional income, there came to Farrar the greatest blessing of his life. In 1878 he married Lucinda Davis Stamps, niece to Jefferson Davis, who survives him with two sons and

*Address delivered before Louisiana Supreme Court, Oct. 2, 1922

1. Since the delivery of this address, Judge F. D. King, of the Civil District Court, New Orleans, tells me Farrar practiced in Tensas Parish, Louisiana, until 1875. In that year he returned to New Orleans and brought his desk into King's office at 9 Carondelet street, on a cost-sharing basis. This was a room up two flights of stairs, rented for $15.00 per month, a "porter" to clean up added $3.50 and an occasional barrel of coal for the office grate summed up the overhead expense of the three young lawyers who occupied the office, F. D. King, Hampden Story and E. H. Farrar. Story dropped out shortly afterward

five daughters, a splendid aggregation of capable men and women to comfort her saddened future. Mrs. Farrar was mentally her husband's equal, and to this she added a well balanced soul. She kept his hearth fire lighted, and sustained the burdens of the home and children. She shared his triumphs and his sorrows; she was more than a wife to him, for she was always his constant and tireless friend, never wavering, always ready to bind his wounds, and in this calm, quiet, inspiring relationship, Farrar leaned more and more upon his helpmate and never found her judgment wrong.

He was already a marked character and a successful man in 1880 when he delivered an address at the Commencement Exercises of the Academic Department of the University of Louisiana, that set people talking all over the State. The audience thought, if it thought at all, that it was about to hear the usual lucubration of such an occasion, but none of us who knew him were surprised when he launched into an attack upon the educational methods of Louisiana, and massed facts and figures in a review of its futile and haphazard adventures, in what he declared to be an abysmal desolation. That was bad enough, but he laid a merciless finger on a running sore and indicated by place and name the Egyptian darkness that prevailed in certain sections of the State. It was pitiless and startling, and it jolted our pride, and that was what he intended to do. He laid irreverent hands upon the past and in masterly fashion summed up the history of our attempts to educate by way of colleges, universities and like high-sounding institutions. All the qualities of the man as we afterwards knew him were put in evidence in this argument; the force, style and manner of speech of the man of 1880 can be duplicated in his public work of later years. He referred, for instance, in this first public utterance, to one of our proudest institutions in these words:

> In 1877 the Agricultural College, then a flourishing institution situated in this State, was uprooted, located at Baton Rouge, and united to the wreck of the Seminary of Learning under the sesquipedalian title of "the Louisiana State University and Agricultural and Mechanical College"—a nomenclature explicable, in view of the present organization of the institution only upon the principle of *lucus a non lucendo*, because neither agriculture nor the mechanical arts find a place in its curriculum.

And as he treated the higher institutions, so he assaulted the policy and practice of public education in the lower branches. It was a trumpet call and it was hard to bear even though everything he said was true. But it was no idle blast, the call that he uttered came from his heart, for at all times during the remainder of his life, he insistently returned to the necessity of education, and particularly of better education for the people. He believed, in his intolerant way, that half the troubles of the State were due to her failure to properly educate her people.

It is said, and I believe it to be a fact, that this address attracted the attention of Mr. Paul Tulane and brought Farrar in contact with him, and thus began the relationship which, less than two years later (in 1882), produced the plan for the organization of Tulane University. Mr. Farrar is credited with the authorship of that plan, although it has been claimed by others, but I have no doubt whatever, knowing him as I did, that if the plan as it now stands was not his entire production, he at least provided the frame-work upon which it was built. He was named as one of the Administrators of the new Institution, and to it he devoted his time and affection to the hour of his last breath. But the point that interests us, however, is that in this onslaught on the educational policies of Louisiana, we find in the youth the father of the man. It established a champion fearless and forthright, who was ever afterwards to be considered in all public questions.

The only office he ever held, that of Assistant City Attorney of New Orleans, came to him early in his practice, but it was not the lure of office that took him to the City Hall. He went there with the purpose and desire to introduce different methods into its management; he took that office at a time of civil enthusiasm, he did not owe it to the politicians. I have said that Farrar, in his young days, gave one the impression that he was about to lay violent hands on the subject under discussion. That was apparently a mannerism and it was a serious impediment to his usefulness; but it was deeper than the surface. In him there existed a tumultuous soul that rose and chortled at wrong, or what he conceived to be wrong, in public life or in the legal arena. With this disposition he was about the last person in the world one would select to convert place holders or to regulate a quasi-political office, and the attempt was only the courting of disaster, but his point of view required him to think not of his personal benefit or welfare, but of his duty as he saw it, and this called him to maintain the good fight, to attack and denounce and to overthrow, if he could, that which he believed not to be the public benefit nor required by the public for its necessary good. Nor did failure daunt him, nor financial loss, nor factional pursuit.

One of the greatest labors of his life illustrates this picture of the man. In 1897 he lead a movement for the suppression of State quarantines against Louisiana. Yellow fever had afflicted us, introduced through the maritime commerce entering the port of New Orleans. The State was practically isolated by the health authorities of the surrounding States. The spectacle of the shotgun quarantine assumed then, and for the first time in our history, the attitude of war by one State upon the other. I suspect I am not far from the truth in saying that every practical man, and particularly every business man in Louisiana, desired in 1897 the intervention of the United States and the establishment of Federal Quarantine. It was believed that the regulation by the other States, at the time of epidemics, of the course of life in the States affected by it, was a matter that should be handled by the Federal Government and not left to the fear, greed, or other impelling impulse of the neighboring States. In 1898, after the subsidence of the fever, Farrar was asked to discuss before a Convention at Mobile the question whether the power of quarantining lay in the State Legislature or in the Congress of the United States. It was his matured conviction the power lay with the State Legislature, and that the Congress of the United States was without power or jurisdiction to remedy the evils we had suffered. We are not

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and King and Farrar divided the expense until 1884, when the Kruttschnitt partnership was formed, with offices in the old Denegre Building. Judge King says that for six months no clients visited Farrar; during that time he was continuously studying law, and never left the office, save for lunch and dinner. His first case was the Succession of Fassman, brought to him by his kinsman, E. Howard McCaleb, a lawyer in good practice. It was an important case that McCaleb could not handle for personal reasons. Farrar prepared it diligently (he had nothing else to do) and the trial and argument before Tissot, Judge of the Probate Court, established Farrar's reputation. He won his case and thereafter clients came slowly but steadily to him.

presently interested in what he said or did, except to illustrate the man and his ways. In a masterly argument, that could be answered only by ignoring his premises and building upon another and different foundation, he furnished the arguments that were seized upon particularly by Texas and Mississippi to defeat the attempts of Louisiana to free herself from the imprisonment into which she fell whenever epidemic diseases visited her territory. I may add that in Congress and out of the same, the fight for a Federal Quarantine Law was debated by the opponents of the measure without striking out a new thought or adding a line to the masterly argument made by Farrar. Following his convictions, and apparently to test out the same, Mr. Farrar presented the question to the Supreme Court of the United States in the case of *Louisiana vs. Texas* (176 U. S. 1), contending that the embargo placed by the latter upon the commerce of New Orleans in 1898 (during a sporadic return of the plague, was in the nature of a commercial war by the one upon the other, and not for the bona fide purpose of protecting the health of the State of Texas. The court dismissed the Bill as not presenting a justiciable controversy between two States within the purview of the Constitution. But *inter alia* the court intimated that such quarantines were valid under the power of the States until displaced by Congressional legislation.

In 1905, Louisiana was again visited by yellow fever, and the same quarantine problems arose again. Indeed the Governor of Mississippi called out the militia and created a navy to prevent the movement of man or beast or property from Louisiana to Mississippi. Farrar was appealed to again for an opinion, with the idea, doubtless, that experience, the public necessity, and the intimation thrown out by the Supreme Court, would suggest some practical method of reaching the evil. I know that men of power and position in this commonwealth discussed this question with Farrar and waited upon his opinion as though it was to be the final judgment of the last court of the land; but his ideas of the limitations of the Constitution of the United States and of the reserved rights and powers of the States had not altered. He stood for the position that Congress was without authority to legislate in matters of interstate quarantine, and he wrote a supplement to his great argument of 1898, suggesting that the matter was one of Compact and Agreement to be entered into between the states under Paragraph 2, Section 10, Article 1 of the Constitution of the United States. Opposed by this legal giant, those of us who contested his view were able to get through Congress only an act permitting the States to surrender maritime quarantine to the United States, as was afterwards done and to the great comfort and happiness of this State at the time of the bubonic plague. But Farrar's argument on the general question converted, or appeared to have converted, the great bulk of the members of Congress, and unless some change shall be made in the Constitution or the Congress shall hereafter usurp, as Farrar would have it, the disputed power, we are still powerless to prevent similar injustice between the States should the occasion arise.

The story of the Quarantine Debate illustrates one side of Farrar's character, a self-centered man, faithful to his convictions, able to sustain them, and fearless in expression, the kind of leader that is the hope of democracies, for public right, public wrong, should everlastingly be the object of defense or attack by those who love our Institutions. It was Farrar's creed that this holy task was part of his duty as a citizen, a duty to be exercised at all times, without regard to his comfort, his other duties, the charms of friendship or the peace and quiet of successful life. Indeed, public service was the outstanding feature of his career, and no memorial of him may slight or disregard it. But the subject presents an embarrassment of riches, and we are constrained by the occasion to follow it only in some particular aspects. Thus he took up the cudgels in a very battle royal, the effort to establish a modern system of drainage and sewerage for New Orleans. The passions and disturbances of that contest have been forgotten by us, and the younger generation would probably wonder that any argument could ever have been made in favor of open gutters and vile dumping places for garbage and worse, but the fight needed a leader, and Farrar was again enlisted in a long and arduous campaign, and his brain devised the plan and provided the fundamental ideas upon which the present drainage and sewerage system is based. In any other country a monument would long since have been erected to this splendid achievement of his intellect—the successful establishment of the greatest good that this community enjoys.

Another famous event in the annals of Louisiana can never be mentioned without recalling Farrar's part in it. I mean the campaign for the destruction of the Louisiana State Lottery. In the case of the yellow fever, public sentiment was almost solidly against him. Here it was divided, and as the results showed in the polls, the electorate of New Orleans was largely in opposition to his views. That, perhaps, was influenced by the belief that the enormous sum offered by the Lottery for its recharter was needed by the State, would relieve taxation and would help sustain its languishing public institutions. If it is true, as I think it is, that the anti-lottery campaign was not a popular one in New Orleans (where the Lottery was located and had entrenched itself) Farrar gave no heed to the question of popularity, nor did he consider the sacrifice of himself that might follow his defeat. He believed the Lottery to be a great public evil and he threw himself into the campaign with all the ardor of an ancient knight-errant. He was not a candidate for office. He could readily have kept his opinions to himself, or communicate them only to private ears. Aye, more, he could have avoided the enmities which that affair engendered, for brother was opposed to brother; it colored social life and endangered the relations of friendship and of blood. But Farrar stood forth as the champion of the right and for what we now know was the right thing, and he never wavered until the Lottery was eventually overthrown, not wholly by the people, be it remembered, but by the efforts of men like Farrar, White and Nicholls, who carried the contest into the departments of the Federal Government and throttled there the evil which it seemed impossible to suppress at home.

At another time the Governor of Louisiana drafted Farrar into service as one of the Commission upon taxation, and he was president of the Louisiana Tax Commission of 1912. The latter incident is still fresh in the public mind. Farrar accepted, abandoned his practice, established himself at Baton Rouge, and

for weary days and nights devoted his whole soul to the task. Other men gave like service, and doubtless suffered losses, but Farrar had given so much, labored so zealously, sacrificed so continuously for the public welfare, that his service here seems to be at once the most sublime and yet the most pathetic incident in his career. The labor bestowed by him so lavishly was a futile expenditure, it brought no result to the State, but it made him poorer because there is little doubt that his overtasked mind and body received here the thrust that eventually laid him low.

This and other public work of like character, that time does not allow us to mention, is an indication of Farrar's activity in matters outside of the practice of law. But hand in hand with all this went an ever increasing professional responsibility. He had early formed a law partnership with the late Ernest B. Kruttschnitt (in 1884), who was considered then to be and he is still remembered as, a consummate lawyer. He was the antithesis of Farrar in disposition, in methods of work, in public ideals—in short, there could never have been imagined a partnership between two such differing characters and it was freely prophesied it had been formed only to be dissolved. Some one said that as partners and collaborators they would be able to agree upon nothing. In politics, if Farrar was not actually in revolt against the regular organization, he was always on the point of doing so. Indeed, he was a reformer by instinct, as may be indicated by the fact that for years he was Chairman of the Committee of One Hundred, which was dedicated to the reform of the Municipal Government of New Orleans. He was also Chairman of the Committee of Safety, formed to prosecute the assassins of Chief of Police David Hennessey, and one could go on indefinitely with similar services. Almost all of this in some way touched the political alignments of his day. If ever Farrar voted with the regular organization, no record exists thereof. I do not say that he did not at some time support the regular organization, for it was very likely with his disposition that he did do so, but he never asked consideration from the organization and so far as I know, never expressed himself at any time wholly in favor of it. His partner, Kruttschnitt, on the other hand, was Chairman of the State Central Democratic Committee; he was the recognized legal adviser of the regular organization in New Orleans, and he could have had any office within their gift had he seen fit to accept it. While Farrar poured his exhaustless energy into public affairs and into warfare upon public evil and assaults upon political machines, Kruttschnitt pursued the even tenor of his way and he doubtless had many a wary consultation with those against whom much of this attack was leveled. But the prophesy of early dissolution proved a baseless and shortsighted view, for putting aside their political dissimilitude and disregarding their temperamental differences, there never was, in my judgment, a combination in New Orleans equal to the one which encompassed the knowledge, business judgment, professional skill and logical power of these two men. It was a mighty fighting engine; a great combination of counsel, and the firm name, Farrar & Kruttschnitt, stood then and ever afterward, here and elsewhere, for something equivalent to Gibraltar, or any other word which would signify enduring strength and persistence.

The temperamental differences of these two partners were exemplified by their office methods. Farrar used his own pen for all creative work. Had he to give an important opinion or to execute any other task of creative character, every word of it was put by him on paper in his own handwriting, which was always legible and moreover, using pen or pencil, he could throw off page after page with startling rapidity. Kruttschnitt, on the other hand, dictated everything. Of course, in a busy firm, these mental habits would have created an inequality in the burdens, for, sooner or later, the man using his fingers would be hopelessly overwhelmed, and the man using the amanuensis would have to rescue him. But that never happened in their office. It was currently believed that Farrar would pile his work upon his desk in indiscriminate confusion. They said, humorously, of course, that he would then divide it into three piles; one that needn't be attended to, the other that would attend to itself, and the third that which had to be attended to. Then there would come a time when the patience of his associate, his clients and himself had reached the ragged edge and Farrar would call in a stenographer, or if necessary two or three of them, and clear up his desk in a mighty Herculean cleansing, and it is said he would sit, if necessary, through twenty-four continuous hours without a break, and then—why in all probability it would begin to accumulate again. I suspect that story is good enough to be true, even if not exactly true. The fact is there were two Farrars; the one who mused, pondered, deliberated and acted; this was the man who spun his thoughts out by his own fingers and who moved slowly but exactly to the completion of his foreordained conception. The other was the Farrar who disliked detail, who saw the routine of a law office accumulate with constantly growing contempt, who furthermore was being mercilessly whipped by the unshakable companion, his sense of duty, which has figured in these remarks, until finally the "stings and arrows of outrageous fortune" would irritate his brute strength and drive it pell-mell upon the unpleasant and persistent obstacle. But let it not be understood that Farrar neglected his business; his opponents in a law suit felt sometimes that it was easier to move the Court House than to move him, and this I think was due in such instances to the load he carried, for it is not always possible to pledge the brain to two services at one time, but when Farrar reached the point of readiness, his glacier-like movement ended and a torrential rush succeeded that kept everybody anxious and busy.

I do not know what income the firm of Farrar & Kruttschnitt was earning, they were considered to be great fee-makers. Their office was in its early period about the largest, and certainly quite the most expensive then in New Orleans. They were retained by powerful clients; they represented various transcontinental railroads; they were connected with the street railway system. They had an admiralty and equity practice, the envy of less fortunate lawyers, and they had clients in the great financial centers of the country, who kept them constantly occupied. Their retainers carried them into all parts of the United States and they necessarily must have been great money-earners. One of their contemporaries with more thrifty office habits declared that they just had to make it because they spent it like drunken sailors—he was referring here to the busy hive that housed the great counsellors, but were he living in these days he would have another thought, for with all their labors, their earnings and expenditures, I doubt

whether Farrar & Kruttschnitt ever received the honorarium they were entitled to demand, nor would their earnings compare with any one of a half dozen great law firms of today, nor with the expenditure necessary now to accomplish the work that earns such fees.

After the retirement of B. F. Jonas from the Senate of the United States, he was admitted into the firm of Farrar & Kruttschnitt. The new partner was a safe, judicious adviser and a sound lawyer, but he did not hold the place in Farrar's heart so long occupied by his friend, Kruttschnitt, and the latter's lamented death in 1906, in the prime of his life, was a sad blow to the leader and a personal grief that was never healed. A handful of younger men had been trained under the dead man's eyes and one of them, Abraham Goldberg, was admitted to partnership and his loyalty and affection cherished the old master and materially alleviated his labors. Later on there were other changes in his firm, incorporating his son-in-law, Goldsborough, and later came the accession of Generes Dufour; toward the end the burden fell on Goldberg and Dufour, who kept the large practice together and added to it. They sustained with skill, zest and ability, the ancient reputation of the firm, and comforted and protected the veteran's declining years.

Disregarding the professional tasks of Farrar's partners, and considering only those cases that we know were handled by Farrar alone, the record of his work presents an amazing mass of litigation of the very first class, whether we consider the value at issue, the question debated or the importance to the litigant. Indeed, it is comparable to the roll of Battle Abbey for nearly every great cause famous in our legal annals, appears in it. Among the more recent cases, the mind recalls off-hand, the New Orleans Gas Light case, the Gaines Succession, the New Orleans Water Works litigation, the Carondelet Canal issue, the Hutchinson Will case and the Fish-Harriman contest. These are but a half dozen among scores that could be named, any one of which would be a crown in the career of the average lawyer. The last case Mr. Farrar argued in the Supreme Court of the United States (1915), the Myles Salt case, (239 U. S. 478), must be mentioned for memory's sake, aside from the fact that it established a principle of taxation of infinite importance to the people of Louisiana. Going through this record of a busy professional life, one is the more amazed that Mr. Farrar ever found the time to render the public service we have discussed, but that is a greater reason why it should be emphasized because after all a lawyer's fame as such dies with him or fades rapidly after his death. His service to his people is his enduring monument and here Farrar builded wisely and well.

But we may not leave his professional career without noting its constructive side. In his period of activity, he was retained in many great tasks which never appeared in Court records. He created corporations and many great private institutions that still survive. He was in constant demand as a builder and constructor. This creative genius was one of the noteworthy possessions of his life, and it was constantly functioning in the midst of the exciting and exacting duties we have described.

Another aspect of Farrar's career must be recalled, he was a student all his life. The law he loved passionately; she was of course his mistress and he courted her assiduously for the love he bore her and never for gain in the vulgar sense. But he had other passions of like nature, thus he kept at his bedside a copy of Horace, he knew the Classics and he knew general literature as only one of his methods would know these things. His marvelous memory never shone to greater advantage than when some sudden call moved him to talk outside of shop. Things we knew and had forgotten, things we believed we knew and things we never knew, poured out in form and shape to charm our souls and to make us marvel at the mind that could harness and retain these ornaments of life. Farrar sat once on a short trip alongside one who thought he knew the history of Louisiana; a chance remark opened the flood gates and the listener afterwards said that he was shocked and amazed to find how little he, a student, knew or understood about a subject that Farrar seemed to have picked up and stored away by mere chance and for no immediate purpose.

Another of Farrar's passions was the American Bar Association. In this gathering of lawyers from the whole country, he early established a position, unique in one sense but remarkable in another. There he met the great and the small, but into every circle the man's charm permeated and he was as surely beloved and respected there as ever man could expect to be. His name and his reputation was dear to all who took part in its executive administration, and who governed the destiny of the institution, while the rank and file held him in similar veneration. Before this body he read in 1908 a paper on The Extension of the Admiralty Jurisdiction by Judicial Interpretation. It is a perfect example of the Farrar style and a most valuable addition to the literature of the subject. It shows familiarity with sources, labor and research and a method of presenting the question that I find nowhere else in our literature, except it be in the opinions of Chief Justice White. It was a great thesis and it should be read even though we feel no personal interest in the subject.

In 1910 Farrar's long public service and his undoubted leadership at the Bar of the United States received recognition in his election to the Presidency of the American Bar Association. His annual address in 1901 was in part a contribution to a subject, urgent then and equally urgent now, the "Unlimited Power of Incorporation," which he said was an evil tendency of the times, insofar as it permitted, without restriction, the aggregation of capital, the mishandling of the same, and the resulting political power which these organizations engendered. Starting with a quotation from the speech of Sir John Culpepper, in the Long Parliament, where he described the monopolies of his time as "a nest of wasps and a swarm of vermin which have overcrept the land," Farrar said:

> The economic advantages, if any, that follow from these vast aggregations of capital are drowned in the firm belief that they exercise too much political power; that they exercise such power selfishly and unscrupulously, that they bar the door to private enterprise, blight local industries, cramp the industrial freedom of individuals, destroy equality of opportunity, and extinguish all hope and hence all ambition for industrial independence and autonomy.

He argued, as I understand him, for Federal control of these corporations. This was not an original thought but as he cast up the balance of profit and loss to the country, his argument furnished a slogan that has been used from that day to this. Indeed, the main idea of his thesis has now become one of the elements

of common political thought. The doctrine he advanced in this argument was, as I have said, not a new idea with him nor with others, neither was it intended to be the setting out of a popular nettle to wound the hand of the corporations. He sincerely believed that plutocracy was a curse which would eventually destroy the liberty of the people, and he had argued that proposition in June, 1902, in an address before the Society of Alumni of the University of Virginia in a most masterly and convincing way, showing by history that the United States, and particularly a certain section thereof, was driving upon the rocks that revolution had removed from France, and that had been charted and guarded against in England. But the point to be emphasized is that Farrar should have chosen the place and the hour that he chose to develop this theory before an audience who could, it is true, understand its purpose and scatter its seed broadcast upon the country, but part of that audience would indubitably interpret it to be an attack upon financial institutions, made more insidious through the station occupied by the assaulter.

This address has already exceeded its proper proportions, but there is still much to be said that should be said here. I have noted that Farrar was a Democrat. A time came when his loyalty was to be sorely tested. In his omniverous way, Farrar had studied bimetalism, and had reached a conclusion upon the free coinage of silver, a question then agitating the United States, and his judgment placed him in opposition to the doctrine announced by the National Democratic party, and emphasized by Mr. W. J. Bryan. Farrar concluded that Bryan was a false prophet, that he was disrupting the party, that his doctrines were revolutionary and would destroy the government, but Farrar was a Democrat. On principle he could not follow McKinley and the Republican party, and he must follow Bryan, be muzzled, or revolt. As was to be expected, he adopted his own course. He concluded it was his duty to speak out and he did so. He was one of the organizers of the schism in the Democratic party against the nomination of Bryan, and was the temporary chairman of what was called the "Gold Convention," that nominated Palmer of Illinois for President against Bryan and McKinley. It was a hopeless political revolt, dooming his party to defeat. But that did not control his convictions and with voice and pen he incessantly discussed the issues of the campaign until it terminated in Bryan's defeat.

The Anti-Silver Campaign left a bitter taste in Farrar's mouth and, contrary to his usual rule, this did not pass with the defeat of Bryan in 1896. That defeat, as we know, did not shake his hold upon the machinery of the party and his quadrennial nomination stirred the ashes and relighted the embers of the preceding campaign, until Farrar, and others like him, despaired of the future of the Democratic party. That party, in Farrar's opinion, was the party of the Constitution, and the safeguard of the Republic. He considered the constant repetition of Bryan's name to be contrary to party principles and an evidence of a rule or ruin policy that should not be tolerated. In short he had reached a point of view that definitely located Bryan among the enemies of constitutional government, and when President Wilson called Bryan to the Portfolio of State in his first administration, Farrar's cup of wrath overflowed. Then followed the World War. Farrar's position need not be stated, indeed it would have been contrary to every action of his life to hesitate for one moment as to his position regarding the duty of his country. He was in favor of action, civilization was endangered, there was but one attitude in his judgment for the country to assume. In the meantime, Bryan was, justly or unjustly, believed to be holding Wilson back. His course as Secretary of State, disturbed and distressed those who felt as Farrar felt. The "Great Commoner" held on however, while the country rocked in displeasure. Then there came the day when Bryan retired from the Cabinet; I think it is quite within the bounds to say that no single act of Bryan's life, caused so much pleasure to so many people. It was felt by multitudes in every section, that a great load had been lifted and that the country would now recover its self-respect. I am not disparaging Bryan or holding a brief against him. It is an historical fact that it was considered that Mr. Bryan's opinions affected his judgment and that with his views he was a burden too heavy for the administration to carry in a time of imminent danger. Farrar went further, and in his rough way, classified the Secretary of State with Benedict Arnold, and when he retired from office, that there might be no concealment of his opinion, Farrar sent him this comforting telegram:

Chicago, June 9th, 1915.

Hon. W. J. Bryan,
Ex-Secretary of State,
Washington, D. C.

He that divideth the counsels of his country in the time of her peril is both a coward and a traitor. If I ever needed any justification for my bitter opposition to you since you appeared as a marplot in the Democratic Party in eighteen hundred and ninety-six the measure is now overflowing.

EDGAR H. FARRAR.

I have noted that Farrar was a railroad lawyer; that he had created such corporations, had represented them all his life, and under ordinary conditions would have been expected to be quiescent, and to follow his private occupations during the great contemporary discussions, regarding combinations and reorganizations of these corporations. But he had given the question absorbed attention and had reached conclusions he considered sound and useful to the country. In 1907 he addressed an open letter to President Roosevelt advancing the contention that under the postroads clause in the Constitution the Congress had full power to enact laws which could control railroads whether interstate or otherwise. The open letter roused both political parties and created a storm of discussion in all parts of the country. The problem was one of great magnitude, the financial interests tremendous, and the public interests even greater. In reply to this criticism, Farrar wrote and published an argument that would have made the reputation of any man. Here he ultized his vast knowledge of the Constitution and brought to bear all the guns of his magnificent intellect in a creative essay which, though it failed of immediate results, has unquestionably had its effect on legislation and jurisprudence.

I have previously said that Farrar presented to his contemporaries a dynamic energy that seemed to shake his soul, and that in law suits and in public life would explode and terrify the beholder. It was commonly said of him that these exhibitions of irascible temper evidenced an imperious and injudicious mind, but it is nevertheless true that these ebulitions were not erratic but rather an aspect of a just, sound, sane,

honest mind; I doubt if Farrar ever had a feeling of animosity against anyone. His wrath was stirred against things and against conditions. Ignorance was intolerable to him and excited his malice, but it was the ignorance and not the victim of it that aroused his ire. The moment he realized he was misunderstood, he would hasten to rectify the situation. Thus he would explode during a trial, he would shake the courtroom, irritate opposing counsel, and sometimes, I grieve to say, the presiding magistrate, and he would do this without apparently appreciating the feelings of the victims or understanding the full force and effect of what he was doing. Yet it so often happened as to become a rule with him that after such explosions his second thought would send him to the counsel or to the judge to explain, or, if necessary, apologize for what had been said and to indicate that there was no personal malice behind his words. He would in like manner attack some public evil represented in his view at the moment by some individual, and he would expend his accumulated wrath and the indignation of his soul upon the object, and yet he would be the first to take the individual by the hand and labor to prove to him that it was not him but the thing which he represented that had stirred the attack. It is also known that where he was successful and the evil had been overthrown, his generous hand would often provide for the wants of those who had suffered from the victory. There is one unparalleled illustration that seems to establish this view of the "Farrar temper." He had suffered a grievous and terrible injury. His son had been slain by a common malefactor. Public excitement and the circumstances of the crime brought the murderer to quick justice; he was found guilty and condemned to death. He applied for a pardon and for a commutation of his sentence to imprisonment. Whether the application would have been favorably considered was immaterial to Farrar, who had been holding in his own soul a court where he had debated and discussed and decided the problem of the criminal's responsibility. He wrote with his own hand to the Governor of Louisiana, a letter which must be quoted in full to thoroughly understand the nature and character of this great soul. Under date of November 28, 1912, he said:

His Excellency, Luther E. Hall,
Governor of Louisiana,
Baton Rouge, La.
Dear Sir:

On this day of Thanksgiving, the thoughts of all my household were turned to the chair made empty by the crime of the poor wretch, the date of whose execution you have fixed. This matter has been in our minds for some time, and after mature deliberation, all of us, father, mother, sisters, brothers and widows of my son, have concluded to ask you to reprieve Rene Canton, and to send his case before the Board of Pardons for their consideration as to whether his sentence should not be commuted to imprisonment for life. We feel that this young brute is the product of our system of society, for which all of us, particularly persons of our position, are to some extent responsible. His father and mother are honest, hard working people. With them the struggle for existence was too bitter and exacting to permit them to devote the time and personal care necessary to develop the good and repress the evil in their son, who thus grew up amid the malign influences that surround the children of the poor in a large city. We believe that he shot my son as instinctively as a snake would strike one who crossed his path; and while his act was murder in law and in fact, yet it lacked that forethought and deliberation which make a crime of this sort unpardonable. This man is now in no condition of mind to be sent into the next world. We hope and pray that time and reflection will bring repentance and that his soul may be saved.

Your obedient servant,
EDGAR HOWARD FARRAR.

Had Edgar Howard Farrar died in the year 1916, when his body was smitten and his activity shortened, it is possible that at the bar, which he had dominated by sheer intellectual, almost tyrannical force, supported by abounding, apparently exhaustless vitality and buttressed by his seething, turbulent indignation, it is possible, I say, that these characteristics would have left their sting and irritation, and that at least for a while, no other interest would have been then felt, than the usual pity for a strong man overthrown. The same might have been true, though I do not see how it could have happened, with regard to his public service. It must however be remembered that though he never sought an office, that though in all his actions he was impelled by a high sense of duty, by love for his people and affection for his country; that though he was never governed by any sentiment except the public welfare, yet it is undeniable, he had roused animosities and often overthrown a strong and well entrenched opposition that necessarily regarded him as a dangerous man. His enemies for the time being denounced his interest in public affairs; he was in their eyes, a pernicious and disorderly citizen; the integrity of his purpose was not only doubted by interested persons, but they imposed that opinion on their friends and supporters; in short, Farrar stirred up a host of enemies, whose onslaughts never ceased so long as he faced the public and exhorted it to a course of action inimical to and destructive of the evil which he attacked. Had he died in 1916, this temporary judgment might have been pronounced, leaving to posterity to right the wrong.

But he did not die in 1916, and he lived long enough for the excitement to die down and for the real character of his career to obtain its proper perspective. His contemporaries, his friends, his opponents and his enemies began to think about the man out there in the twilight of his life upon whom the western sun was slowly sinking. Long before he passed away, they had granted a rehearing and a verdict had been rendered, that unquestionably will be the verdict of posterity. The disaster that overtook him in 1916 was fortunate for his reputation. Time silently reversed the rule that appraises worth after death.

When they are dead we heap the laurels high,
Above them where, indifferent, they lie;
We join their deeds to unaccustomed praise,
And crown with garlands of immortal bays,
Whom living we but thought to crucify.

He lived to frustrate the poet's wisdom. He knew that the world at last understood him. Before he died, the opportunity for reflection and consideration had been exercised, and forgetting all else, they said of him:

He is a great lawyer and an intellectual giant. He is a brilliant controversialist and a constructive statesman. He has won imperishable renown in the service of his country and in labor for the welfare of the State.

So say we all, but we must also say that he greatly honored in his life the State that bore him. That he preserved the dignity of our profession and made it easier for us to follow the path hewn out for us by his impetuosity, stern virtue and splendid courage

CURRENT LEGISLATION

It will be the purpose of this Department to bring to the attention of the bar the interesting changes in the fields of law which are being made by the legislatures. No person can be more alive to the possibilities of error, especially errors of omission, than the editors of the Department. The work of collecting the statutes for the past year has been performed under great difficulty, but it is hoped that it will be more successful with greater experience. The notes in the department will be simply a statement of the law as it appears in the statutes, with little or no attempt at its interpretation through a discussion of the cases. It is hoped that members of the bar will co-operate in calling the attention of the editors to omissions and mistakes and in supplying them with important new statutes in their states. Only by such co-operation can the department succeed.

Married Woman's Naturalization Act

AN act relative to the naturalization and citizenship of married women, approved September 22, 1922, carries out the pledges of both Republican and Democratic National platforms of 1920 and adopts principles endorsed by many important women's organizations in the United States. It applies to the right of expatriation and naturalization the principle of equality of the sexes before the law whose influence has been already noted in the JOURNAL.

The bill provides that "the right of any woman to become a naturalized citizen of the United States shall not be denied or abridged because of her sex or because she is a married woman." Thus, the rule usually followed that a married woman could not be naturalized as long as her husband remained the subject of a foreign state (Van Dyne on Naturalization, page 52, Report of a committee by the House of Representatives, Sixty-seventh Congress, Second Session, No. 1110) is abolished, and any woman who satisfies the requirements of the naturalization law may become an American citizen, regardless of the allegiance or of the wishes of her husband.

Tribute is paid by the act, however, to the principle of the unity of the family. If an alien woman marries a citizen or if her husband becomes a citizen by naturalization, she may herself acquire American citizenship after "continuous residence in the United States, Hawaii, Alaska or Porto Rico for at least one year immediately preceding the filing of the petition" in lieu of the five years' residence in the United States and one year's residence in the state or territory where the Naturalization Court is held which is usually required. Nor need she file the usual declaration of the intention. The petition for naturalization is sufficient. No relaxation of other conditions which must be fulfilled by the applicant for citizenship, however, is permitted and she must qualify as to race, age, education and moral character in the same way as any one else.

Conversely, "a woman citizen of the United States shall not cease to be a citizen of the United States by reason of her marriage after the passage of this Act." However, just as it was made easy for an alien wife to acquire the nationality of her American husband, so the Congress makes it easy for the American wife of a foreigner to avail herself of her right of expatriation. She may renounce her citizenship before a naturalization court, and Congress even goes further and treats her in the same way as a naturalized American citizen is treated who gives up his residence in this country. If she lives continuously for two years in the country of which her husband is a citizen or for five years "continuously outside the United States," she is presumed to have abandoned her citizenship.

In only one case is the former rule retained. If a woman citizen marries an alien ineligible to citizenship she "ceases to be a citizen of the United States" and no woman whose husband is ineligible to citizenship may be naturalized during the continuance of the marital status. The situation of American women who marry these aliens is worse than it was before. Under Section 3 of the Act of 1907, the Expatriation Act, they could "resume" citizenship if within one year after the termination of the marital status they registered with a consul abroad or returned to reside in the United States and if they were residents of the United States, by continuing to reside here. That section has been repealed so that it would appear that they can no longer resume citizenship but must be naturalized in the usual way. If an American citizen by birth, but Chinese by race, marries a Chinese citizen, even though she continues to reside in the United States, not being "a free white person" or of African nativity or descent, she could not be naturalized unless the courts will construe the statutes very sympathetically.

Another consequence of the repeal of Section 3 of the Expatriation Act and the consequent abolition of resumption of citizenship is taken care of by permitting a woman, who before the passage of this act had lost her citizenship by marriage to "an alien eligible for citizenship," to be naturalized in the same way as a woman whose husband is or becomes a citizen.

The Committee held to the principle of the unity of the family in place of that of the equality of the sexes, so far as children are concerned. They report: "This bill in no wise affects the status of children . . . Those born abroad will, as heretofore, take the allegiance of the father." Acquisition of American citizenship during minority may even be rendered impossible under certain circumstances to the children of an American mother and an alien father. Under the Expatriation Act of 1907, an American woman may "resume" her nationality after losing it by marriage and if she does, her minor children, born abroad, will become citizens. With the repeal of Section 3, naturalization of minors by resumption of citizenship of their mother has no longer a statutory basis since there is no statutory resumption. Consequently, under the new law, an American woman who was married, for example, to an Englishman resident in Paris, will retain her citizenship but her children are aliens. If her husband dies or she is divorced before the five year period has expired, she will, if she returns to the

United States, remain a citizen. Her minor children, however, cannot become citizens through resumption of citizenship as would have happened in this case had the Expatriation Act remained in force and they cannot become naturalized until they are of age. They will remain subject to the disabilities of alienage, it would appear, during minority despite the American citizenship which has always been the status of their mother, unless Congress by amendment or the courts by interpretation, come to their rescue.

Thus the United States, under the influence of a new conception of the status of married women, has returned to the ancient theory of the citizenship of married women which prevailed before Congress recognized the principle of the unity of the family as the guiding rule.

Says Van Dyne: "Before the passage of the Act of February 10, 1855, (Revised Statutes, Sec. 1994) marriage had no effect upon the citizenship of a woman; under our laws an alien woman marrying a citizen remained an alien still." In Shanks v. Du Pont, 3 Peters 242, Justice Story held that a woman does not lose her citizenship by marriage to an alien. [See also Beck v. McGillis, 9 Barb. 35, cited in Van Dyne, page 288.] Following the continental codes [Code Civil, Sec. 19], Great Britain in 1844 and the United States in 1855 conferred citizenship on foreign women married to their nationals, regardless of the will of the woman.

After much doubt as to the status of the American woman who married an alien, Congress in the Expatriation Act decreed that they also should follow the status of their husbands. Again by this statute the American law was put in harmony with the rule prevailing elsewhere, even in Britain. (Van Dyne, page 255; Roguin, Le Mariage, page 174). The decision of Congress was upheld in *McKenzie* v. *Hare*, 239 U. S. 299, against the contention that Congress could not deprive a citizen of her citizenship, at least if she had continued to reside in the country and had evidenced her intention to retain American nationality. The court said: "The marriage of an American woman with a foreigner has consequences of like kind, may involve national complications of like kind, as her physical expatriation may involve. Therefore, as long as the relation lasts, it is made tantamount to expatriation. This is no arbitrary exercise of government. It is one which, regarding the international aspects, judicial opinion has taken for granted would not only be valid, but demanded." [312]

The "international aspects" have not changed; it is to a change in "conditions of national moment" (p. 312) that we must look for the motive behind the reversal by Congress of its action of 1907. The immediate result of an adoption by this country of a different rule from that resulting from "the more general principles of the law of nations" (Shanks v. Dupont, p. 248) will be to greatly increase the number of women afflicted with double nationality, and all the litigation which will follow. The question is doubly important in the field of private law because of the wealth of so many American wives of foreigners. Perhaps the law makers of the world will follow the example of our Congress, as in the course of the last century, they slowly fell into line behind the Commission which drafted the French Code, and approve the triumph of the will of the individual over the unity of the family. [For the former law see Moore, International Law Digest, vol. III p. 448 ss., Hyde International Law, Vol. II, page 643. The treaties affecting naturalization are in Van Dyne.]

J. P. CHAMBERLAIN.

Illinois Rejects Proposed Constitution

On December 12, 1922, the people of Illinois rejected a proposed new constitution by a vote of some 900,000 to 200,000. The Illinois constitutional convention assembled on January 6, 1920, and adjourned about two months before the election. It was thus in existence for about two years and nine months, though in recess during the larger part of that time.

The length of the convention's existence was largely due to a deadlock regarding the legislative representation of Cook County. Cook County now has about forty-seven percent of the state's population, and by the present constitution is entitled to representation in proportion to population, though failure to reapportion since 1901 has produced a distinct inequality, inasmuch as this county is increasing more rapidly than other parts of the state.

One group in the convention insisted that Cook County representation should be permanently limited in both houses. Under the compromise finally agreed upon, this county would have been limited permanently to one-third of the membership in the Senate, but would have had equal representation proportioned to its vote for governor in the House of Representatives. Feeling that this plan was unfair may been been partly responsible for the fact that only about one voter in seventeen favored the proposed constitution in Cook County; though the vote in the remainder of the state was also adverse.

The chief reason for calling a convention was a desire to change an obsolete system of taxation. As to this issue also the members of the convention found difficulty in agreeing. Under the plan of the proposed constitution, the general assembly of the state would have been permitted to impose an income tax on the income from intangibles in substitution for the taxation of intangibles by valuation; and would also have had authority to impose a general income tax in addition to other taxes, with the exemptions from such tax determined by the proposed constitution itself. Fear of increased taxation as a result of this proposed general income tax was perhaps the chief factor in defeating the proposed constitution.

The rules of the Illinois constitutional convention gave large influence to a committee on phraseology and style, following in this respect the rules of the Michigan constitutional convention of 1908. Unfortunately, the Illinois convention, through the recommendation of this committee, decided to rewrite much of the language of the existing constitution whose sense was not intended to be changed. Change in phraseology when no change in meaning was intended gave rise to the suspicion that concealed changes were actually being made, and contributed to the defeat of the convention's work.

WALTER F. DODD.

STATE AND LOCAL BAR ASSOCIATIONS

Missouri Association to Urge Legislative Act for Bar Organization—Vermont Backs Publication of History of State Bench and Bar—Birmingham Demands Legislation to Cure Certain Evils—What It Costs to Run One Metropolitan Organization—California's Next Meeting Is at Stockton

BIRMINGHAM, ALA.

Local Association Appoints Committee to Advocate Legislation Dealing With Certain Evils

The Birmingham Bar Association has been very active during the past year in the effort to eliminate evils within the profession. It created a grievance committee for the purpose of dealing with unethical practice on the part of a certain type of lawyers. It has also gone on record in favor of legislation at the coming session making it unlawful for a lawyer to solicit business or for anyone not a licensed lawyer, for compensation, to give legal advice or draw up any legal paper, or accept for settlement, adjustment or collection or compromise, any legal claim or demand.

The proposed measure also provides that no personal injury case can be settled within forty days, nor can there be an agreement for settlement within that time after injury, unless a competent court in open session finds the amount of settlement is fair and equitable. It further provides that no claim agent shall be allowed to collude with any lawyer to throw settlement of the cases of any company to that lawyer. Violation of the provisions of the measure is made a misdemeanor with penalty ranging from a fine not exceeding $500 to hard labor for not exceeding six months.

The grievance committee has been instructed to go to Montgomery as a legislative committee to work for the passage of the bill.

The annual meeting was held on December 15. Retiring officers were congratulated by the membership on the record made during the year. Mr. W. Marvin Woodall, the retiring president, presented a report showing the Association to be in the best condition in its history, with an enlarged membership, funds in the treasury, and a spirit of activity pervading all.

CALIFORNIA

Annual Meeting in 1923 to Be Held at Stockton

The Executive Committee of the California Bar Association, meeting in Los Angeles in December, chose Stockton as the place for holding the fourteenth annual convetnion. October 11, 12 and 13, 1923, are the dates agreed upon. Messrs. George F. McNoble, C. P. Rendon and Arthur L. Levinsky, all of Stockton, were appointed to make the necessary arrangements. President J. W. S. Butler was entrusted with the task of selecting a speaker from outside the state to deliver the annual address. Inasmuch as a bill is to be introduced at the coming session of the Legislature providing for the appointment by the governor of three commissioners from California to the Conference of Commissioners on Uniform State Laws, no action was taken by the Committee to select delegates to that meeting.

CHICAGO

Interesting Program Follows Old-Fashioned Christmas Dinner of Chicago Bar Association

For the purpose of getting the members of the organization together and thereby promoting goodfellowship and good cheer, the Chicago Bar Association has revived its old custom of having an old-fashioned Christmas turkey dinner, with an entertaining program following. The proceedings this year were enlivened with humorous addresses of unusual cleverness, while the words of the songs rendered so effectively by the Glee Club were full of witty local and personal allusions.

In initiating the post-prandial program, President Sherman sounded the note of mock-serious jollity which dominated the proceedings of the evening. Mr. Donald Richberg made a humorous talk about the contents of a certain book on the "Practical Uses of a Legal Education," which he said he was informed certain distinguished ex-Presidents of the Association were about to publish. He referred particularly to certain passages in this alleged production dealing with the "chargeograph"—a remarkable instrument for recording a lawyer's charges for time even while he is away on prolonged luncheons or other diversions; "Creating a Social Atmosphere," "Office Decorations," this last touching, among other things, on the psychological value of properly hung photographs of wealthy clients; not to mention many other equally important subjects.

Particular attention was paid in the proceedings to "Justice" Roswell Mason, who enjoys the singular distinction of having been elected to a position on the Supreme Bench at the very election at which the proposed new constitution providing for the position was signally defeated. Judge Henry Horner, of the Probate Court, was called on to administer the oath of office to the incumbent of the non-existent place, which he did with rare humor. Mr. Mason responded in like vein, after having taken the oath prepared especially for the occasion. Mr. Jacob X. Schwartz followed with a happy talk about the "Junior Counsel," after which Hon. Roscoe A. Heavilin, of Indiana, made an effective address on "Organization of the Bar," in which he advocated the plan now in effect in the State of Washington.

LOUISIANA

State Bar Association Expresses Appreciation of Services of Chief Justice Provosty

On Dec. 30 the Louisiana State Bar Association, through its executive committee, presented a memorial to the Supreme Court expressing the Bar's appreciation of the great services of Chief Justice Olivier O. Provosty, who was retiring after a membership of over twenty-one years on that

tribunal. The memorial was read by Vice-President W. W. Westerfield of the Association, and was signed by Mr. F. G. Hudson, President. Mr. W. O. Hart, Chairman, and Messrs. J. G. Baker, W. M. Cahn, W. W. Westerfield and W. W. Young, members of the committee. It concluded as follows:

"He leaves the highest bench in Louisiana with the love, admiration and respect of the lawyers and judges, and with a priceless heritage: the consciousness that our jurisprudence has been enriched by his splendid contributions, characterized by learning, zeal and untiring industry; and with the thought, that we all give testimony to, that he has ever lived up to those high ideals and ethical principles which have won for him a permanent place, both as lawyer, judge, citizen and man, in the hearts and minds of the people of our State."

MISSOURI

Annual Meeting Recommends Passage by General Assembly of Act for Reorganization of State Bar

The 1922 annual meeting was held at St. Louis, December 15 and 16. In addition to the usual address of welcome and response and the president's annual address, Hon. J. A. Collet, Chairman of the Judiciary Committee of the Constitutional Convetnion, made an address Friday afternoon on the work of his committee.

Friday night the members of the state organization were entertained by the Bar Association of St. Louis at a dinner at the Hotel Statler, and a very delightful evening resulted.

Saturday morning, Hon. Arthur A. Ballantine of New York made an address on "Practical Aspects of the Federal Income Tax," which was not only interesting but instructive. A motion was passed directing that the address be at once printed and circulated among the members.

Saturday afternoon, Hon. Chas. A. Boston of New York, chairman of the American Bar Association's Committee on Conference of Bar Association Delegates, made a most interesting address in regard to the work of that committee.

Saturday night at the annual dinner Messrs. Ballantine and Boston made addresses, as well as the Hon. John T. Harding of Kansas City.

By far the most important work accomplished at the meeting was the passing of a resolution authorizing steps to be taken to secure the passage of an act by the General Assembly of the State, which will make possible a re-organization of the Bar Association on the plan which has been successfully adopted in some other jurisdictions.

This action was taken in accordance with a recommendation of the Committee on Reorganization composed of the following: Francis M. Curlee, chairman; A. T. Dunn, David H. Harris, James H. Harkless and J. M. Lashly. The committee's report did not mince words in speaking of the conditions which demand that the Bar be given certain disciplinary powers. Among other things it says:

> Only one State has now enshrined in its constitution the early conception that any citizen is qualified to be a lawyer. Nevertheless, the fact remains that, in practice, the Bar, like the gates of hell, is open to all comers; and the proportion is steadily increasing of members who know little and care less for the noble traditions of the profession and of its responsibilities, and who regard a license to practice law as a letter of marque and reprisal. After they are admitted they are amenable, for practical purposes, only to the criminal laws of the State, on an equal footing with burglars and porch climbers.

The report points out what has been done in other states in the direction of Bar reorganization and concludes with recommending a measure containing provisions for an integrated bar, with a membership composed of all who are authorized to practice law in the state, and with officers and a managing body having power to determine qualifications for admission, to formulate rules governing the conduct of all those admitted to practice, to hear complaints and take such disciplinary action as the case demands. The Supreme Court may in case of suspension or disbarment review the action of the Board.

NEW YORK CITY

What It Costs to Run a Metropolitan Bar Association —County Lawyers' Association Committee Answers Legal Ethics Question

Some idea of what a bar organization in a great city may mean from a financial standpoint can be gotten from the following estimate of expenses for the fiscal year 1922-23 taken from the budget of the Bar Association of the city of New York:

Salaries (including House and Library employees	$ 49,000.00
Light, Heat, etc. (including Engineer's salary)	15,000.00
Repairs, Supplies and Furnishings	2,500.00
Stationery, Telephones and Entertainments	12,300.00
Committee on Amendment of the Law	2,000.00
Committee on Admissions	1,000.00
Committee on Grievances	13,500.00
Other Committees	1,500.00
Library for Purchase of Books, etc.	15,600.00
Secretary and Treasurer's Office	3,500.00
Miscellaneous, including Stenographic Bureau	6,000.00
Additional Employees Necessary a/c New Building	4,000.00
Additional Asked by Library Committee for Necessary Binding	4,000.00
Interest on Mortgages	40,500.00
Taxes on Association Building	24,750.00
Insurance	1,000.00
Publishing 1922 Year Book	1,500.00
	$197,850.00

The Committee on Professional Ethics of the New York County Lawyers' Association has issued the following:

Question No. 214.—A and B constitute a firm of practicing patent solicitors, practicing in the City of New York. A and B are both registered patent attorneys admitted to practice before the United States Patent Office. A is a barrister-at-law and solicitor practicing in Canada. B is not a lawyer. A and B wish C, a member of the New York Bar, to allow them to put his, C's, name on one corner of their letterhead, followed by the word "Counsel" or "Resident" Counsel." A and B also wish to put A's name on the other corner of their letterhead, followed by the letters "K. C.," meaning King's Counsel, and the word "Counsel," or the words "Chief Counsel and Expert." There is to be no written agreement between A and B and C, but simply an understanding that A and B will turn over to C what law business they can in connection with their patent business, C to make no division of legal fees with A and B whatever. A and B consider that it would be an advantage to them to have C's name on their letterhead as counsel in that they would act as patent experts on legal matters turned over to C.

(1) Is it the opinion of your Committee that it would be unprofessional for C to allow A and B to use his, C's, name upon their letterhead upon the understanding as above set forth?

(2) Is it the opinion of your Committee that it would be proper and right for A and B to place A's name on their

letterhead followed by the letters "K. C.," meaning King's Counsel, and the word or words "Counsel" or "Chief Counsel and Expert?"

Answer No. 214.—The Committee, assuming that the Canadian lawyer does not intend to practice law in New York, does not feel that it should express an opinion upon the propriety of his conduct.

The Committee (in answer to Question 209) has expressed its opinion that a partnership cannot properly be formed between a layman (though a registered patent attorney) and a lawyer, for the performance of legal services. While the present question indicates that the New York lawyer is not to be a member of the partnership, nevertheless, his association as counsel and its announcement on the letter-head, conveys the implication that the patent attorneys are prepared to furnish the services of the lawyer. The Committee is therefore of the opinion that the course suggested is improper.

The Committee has heretofore indicated that in certain cases (for instance, a corporation's, bank's, trust company's, or reorganization or creditors' committee's announcement of its purposes by advertising in newspapers or circulars or upon its letter-heads, or a trade organization's or association's stationery,—see answer 47, Subdivision VIII)—the appearance of a lawyer's name as counsel on letter-heads of his clients, is not improper; it distinguishes the present case on the ground that its implication (as above stated) is that the patent attorneys are prepared to furnish to their clients the services of the counsel, rather than that the counsel is the professional adviser of the firm.

In giving this explanation, the Committee does not intend to preclude itself from extending or applying this distinction in other cases.

VERMONT

State Bar Association Finances Publication of History of Bench and Bar

An important feature of the activities of the Vermont Bar Association during the past year has been its financing of the publication of a History of the Bench and Bar of Vermont, by Hon. Frank L. Fish, Superior Judge, of Vergennes, Vermont. The publishers are The Century History Company Inc., 156 Fifth Ave., New York City. This will be a valuable work. It is expected the volume will be ready for delivery in a short time. It will appear as the fifth volume of Crockett's History of Vermont.

The Annual Meeting of the Vermont Bar Association was held at Montpelier, Vermont, January 2-3, 1923. The general theme of the whole meeting was the progress of legal education heretofore and the educational requirements for admission to the bar at the present time. Aside from this topic, the program included the President's Address by Hon. Edwin W. Lawrence, of Rutland, upon the subject: "Somewhat of Public Utilities"; an Address by Hon. Frank W. Grinnell, of Boston, Secretary of the Massachusetts Bar Association, upon the topic: "Educational Qualifications for Admission to the Bar"; an Address by Hon. Fred B. Thomas, Commissioner of Taxes, of Montpelier, Vermont, upon the subject: "The Property Tax"; an Address by Hon. George E. Alger, of the New York City Bar, upon the theme: "Class Legislation and the Constitution." The speakers at the Banquet included Governor Redfield Proctor, of Proctor, Vermont; Hon. Frank L. Fish, Superior Judge, of Vergennes, Vermont; Hon. Charles S. Whitman, of the New York City Bar; and Hon. Sherman E. Burroughs, of Manchester, New Hampshire, Congressman for the 1st District in that state.

GEO. M. HOGAN.

BRIEF NOTES

Indiana Lawyers Aid Americanization Movement—Milwaukee Bar President Scores Ambulance-Chasers—Wyoming State Association Meet at Cheyenne

The Brooklyn (N. Y.) Bar Association recently held a meeting in honor of Judge Abel E. Blackmar, Presiding Justice of the Appellate Division, who retired January 1 at the age of seventy. Hon. Luke D. Stapleton, formerly an Associate Justice in the Appellate Division, addressed the gathering, and expressed the Association's regret at losing Judge Blackmar from the bench.

Members of the Stutsman (N. D.) County Bar gave a farewell banquet on December 16 to Judge W. L. Nuessle, of Bismarck, who was recently elevated from the district bench to the Supreme Bench of the state. Hon. S. E. Ellsworth presided as toastmaster.

Francis E. McGovern was unanimously elected President of the Milwaukee Bar Association at a recent meeting. He succeeded Mr. J. Gilbert Hardgrove, who had held the office for the past year. In his address the retiring president emphasized the necessity of dealing effectively with the problem of the ambulance chaser and others who violate the ethics of the profession. The newly elected president, in taking over the office, associated himself fully with these views. Mr. Louis Quarles was elected Vice-President and Messrs. Francis X. Swetlik, Bernard V. Brady, Adolph Kanneberg and Albert F. Houghton, members of the executive committee.

The following Committee upon Legislation has been appointed by Judge Frank J. Duffy, of Nogales, Arizona, President of the State Bar Association; R. William Kramer, chairman, Phoenix; John P. Daugherty, Globe; J. P. Lavin, Phoenix; Selim M. Franklin, Tucson; F. C. Struckmeyer, Phoenix. The next annual meeting of the State Bar Association will probably be held early in the spring.

January 11 and 12 were fixed as the dates for the next meeting of the Wyoming State Bar Association, and Cheyenne as the place, at a recent meeting of officials. Judge R. N. Matson is president of the organization and Clyde M. Watts is secretary.

The Dallas (Tex.) Bar Association at a recent meeting endorsed a plan to establish two additional courts in Dallas to relieve the congestion of the civil dockets in the county. A bill will be introduced to this effect in the legislature in January. President Hiram F. Lively appointed a committee to draft the bill and present it to the legislature.

The El Paso (Tex.) County Bar Association has gone on record against calling a constitutional convention in that state at this time, on the ground that present conditions do not afford much prospect for the adoption of genuine constitutional improvements. The subject of a constitutional convention is being discussed in other local Texas bar associations.

Lawyers of the Ninth Congressional District of Indiana, at a meeting held at Frankfort, took steps to organize the district more completely with a view of aiding the movement for a more loyal and intelligent American citizenship. Judge Lex J. Kirkpatrick, of Kokomo, presided at the meeting.

LETTERS OF INTEREST TO THE PROFESSION

Mr. Lowell's War Work at Washington—Prejudices Women Have Had to Overcome in Legal Profession—Early Rhode Island Case—Uniform Law on Legal Age

Mr. Lowell's Services During War

Boston, Mass., Jan. 4.—*To the Editor:* I note in the current number of the Association Journal your intention to say something further about Mr. John Lowell. It was my good fortune to be associated with him during the war under circumstances to which reference might perhaps appropriately be made at this time.

Like many other men who had sons in the service, Mr. Lowell craved definite war work for himself. The opportunity came in the manner perhaps most gratifying to him. After correspondence with President Wilson, Mr. Lowell was appointed by the American Bar Association as Chairman of the War Service Committee whose chief function was to place the lawyers of the country as effectively as possible at the service of the government. Engaged in this work Mr. Lowell practically lived in Washington from January, 1918, till December following the Armistice.

The work of the War Service Committee involved ascertaining from government departments and bureaus where and how they could best use men with legal training either in Washington or elsewhere. It required knowledge of the available supply of legal material and a classification of this material. Contact was initiated and maintained with the heads of the various departments. Relations were established with the seven hundred odd Bar Associations, with the four thousand five hundred Legal Advisory Boards and with other groups throughout the country. As a result, lawyers from Maine to California and from Texas to Minnesota were constantly in contact personally or by correspondence with the office of the Committee to which at the same time came continually requests for lawyers from Government officials all over the United States.

In this way, lawyers were provided for the Bureau of Internal Revenue to handle the very important income tax work. The General Solicitor for the Shipping Board was secured. Innumerable Attorneys were placed in the Military Intelligence, Ordnance Department and Quartermaster Corps of the War Department. Three thousand lawyers were obtained for the Bureau of War Risk Insurance. The Department of Labor, the Housing Corporation, the Department of Justice as well as most of the other Departments and Bureaus, and such semi-governmental activities as the Y. M. C. A. and Committee on Training Camp Activities were similarly assisted by the Committee.

Three examples will perhaps sufficie to show the kind of service that Mr. Lowell performed. He supplied the Military Intelligence Bureau with lawyers who spoke Russian, Czecho-Slovak, Japanese, Roumanian, Norwegian, Swedish, Danish and Dutch. He provided the Judge Advocate General's office with lawyers having insurance experience and a speaking knowledge of French. He was able to suggest to any inquiring Department,—in most instances at a moment's notice, the name of a reliable lawyer at any point in the United States.

How earnestly and successfully Mr. Lowell labored, is shown much more fully in the report of the Special Committee for War Service, published in 1919.

Mr. Lowell was peculiarly fitted for the work in hand. He applied himself with great energy both to the job of developing a reservoir of lawyers and of locating the wants of the Departments. His patience, industry and delightful personality were invaluable assets. He was equally at home with the Secretary of State or General Crowder as with a Lieutenant in charge of a section of a sub-division or with a lad fresh from the law school. He made friends with all, particularly with the personnel of the Department of Labor with whom he came most in contact because of President Wilson's suggestion that the Committee work in close co-operation with that Department.

Mr. Lowell's desk was at first with the Public Service Reserve of the Department of Labor in the ball-room of a private residence hired by the government. Here he worked for many weeks in a hubbub of noise which would have driven to distraction a man less engrossed in public service. I well remember the day that Mr. Whitelock walked in unexpectedly and chaffed Mr. Lowell on his surroundings. Indeed Mr. Lowell had a haunting fear that some day Mr. Root might look him up and think the Committee located not as perhaps comported with the dignity of the American Bar Association. It was because Mr. Lowell accepted the somewhat uncomfortable and humble accommodations in such good spirit, that when the Labor Department moved to more commodious quarters the Committee was given the most desirable location in the building.

Mr. Lowell made the best of things. He did not complain or show the anxiety he felt for his younger son serving in the ranks "somewhere in France." His sense of humor lightened many a strain. He enjoyed his work as he did his play. He had the faculty of adapting himself to the age and point of view of others. While his contemporaries of the Bar Association valued his counsel, yet with youth he was spontaneously young. Under these circumstances, he could not be otherwise than a delightful associate and companion. For these reasons he will be retained in abiding and affectionate memory by all those persons whether government officials, employees or private individuals whom he helped or with whom he worked in Washington during the Great War.

LAWRENCE G. BROOKS.

Women Attorneys

Washington, D. C., Dec. 11.—To the Editor: In no profession have women had more prejudice to overcome than in the greatest of all the learned professions, the law. Chief Justice Ryan of the Supreme Court of Wisconsin in 1875 refused the application of Lavinia Goodell to practice, stating in his decision that "reverence for all womanhood would suffer in the public spectacle of a woman so engaged." Belva A. Lock-

wood was refused in 1873 permission to practice in the U. S. Court of Claims "because a woman is without legal capacity to take the office of Attorney," and the Supreme Court U. S. sustained the decision. How rapidly prejudice can yield to justice is proven by the fact that in less than three years Congress, on February 15, 1879, passed a law which provides that women shall be admitted to the Supreme Court bar with the same qualification as men. Slowly but surely the State Courts have yielded to the trend of progress until women are now admitted to practice in all the Courts of the U. S.

Among the obstacles to women's advancement in the law has been the fact that few law schools were opened to her. It became necessary at the National Capital to organize and incorporate the Washington College of Law, primarily for women but co-educational. Miss Emma M. Gillett and the writer assumed the financial support of this College and received the professional assistance of prominent members of the Bench and Bar. The first president of the Board of Trustees being Chief Justice Edward F. Bingham of the Supreme Court of the D. C., who at his death was succeeded by Chief Justice Stanton J. Peelle of the U. S. Court of Claims. The success of this school has resulted in two of the other white law schools in Washington opening their doors to women. There are now approximately over three hundred young women law students in Washington alone, most of them employees in the Federal service. How many women are preparing for admission to the bar in other localities is not known, but it is safe to say that there is a fifty per cent increase every year. A few of the leading colleges as Columbia still refuse to admit women as law students while opening every other department to them.

Not since the time of Deborah of Biblical days, the righteous judge of Israel, have we the chronicle of a woman Judge until the present century, but Shakespeare's Portia has ever stood for us as the ideal of justice. Within the last six years two women have been appointed by the President of the U. S. to judicial positions: Kathryn Sellers, Judge of the Juvenile Court, District of Columbia, and Mary O'Toole to the Municipal Court, District of Columbia. Hon. Jean Norris is one of the forty-three Municipal Judges of New York City and Florence A. Allen has twice been elected as a Judge of the Court of Common Pleas of Cleveland, Cuyahoga County, Ohio. Judge Allen was elected on November 7, 1922, to the Supreme Court of the State of Ohio. There were two vacancies to fill on this Bench and five candidates. Judge Allen won second place by a very large majority—a promotion given her by the voters of Ohio on her record in the lower Court.

During the World War there was a large influx into the Federal Departments of women who were members of the bar or had studied law. Many of them still remain in the service, but rarely, practically never, are they promoted on their records to the higher salaried positions, as men are. This condition is undoubtedly owing to the prejudices and traditions of the men having the appointing power, or the responsibility of recommending promotions to the appointing power. Now and then a very efficient woman attorney in the departments is raised to the position of senior law clerk at a salary of $2,500, but the same efficiency in a man would be rated as an Attorney or Solicitor at a salary ranging from $4,000 to $7,500.

There are a very few exceptions to this rule as Mrs. Mabel Walker Willebrandt, Assistant Attorney General in the Department of Justice, and the Assistant Solicitor of the Department of State, Miss Anne Agnes O'Neill. Attorney General Daugherty has appointed in the offices of the seventy-nine U. S. District Attorneys throughout the country seven women attorneys as assistant or special attorneys.

Within the last five years the American Bar Association has admitted women as members but the Bar Associations throughout the country do not generally admit women. As the law libraries are usually owned by the men's bar association this is often a handicap to the women attorneys. The Federal bar association in Washington composed of attorneys in the departments has always admitted women and they share the offices also.

The women in general practice are as a class scrupulously ethical and honest in their conduct. The law is the only one of the learned professions considered as public. The Courts are established to maintain the sanctity of the law and every one admitted to the bar is an officer of the Court bound by a solemn oath to uphold the Government and its laws. That the law applies alike to men and women would imply that both men and women should interpret the law. The woman that would make a good mother would make a good Judge.

ELLEN SPENCER MUSSEY,

Honorary Dean of Washington College of Law.

An Early Rhode Island Case

Racine, Wis., Dec. 26.—*To the Editor:* In note 32 (page 669, Nov., 1922 issue AMERICAN BAR ASSOCIATION JOURNAL) to Mr. Cook's very able paper on "Power and Responsibility of American Bar," the author states the report of Trevett v. Weeden, heard by the Superior Court of Rhode Island, *sub nom.* Trevett vs Wheeden, was not published.

A very complete report of the case will be found in the "Proceedings of the General Assembly of Rhode Island against the Judges of the Superior Court of Judicature, for their Judgment in the case of Trevett against Wheeden, on Information and Complaint for Refusing Paper Bills for Butchers Meat, Rhode Island 1786," published in II American Criminal Trials by Peleg W. Chandler 269-350 (Timothy H. Carter & Co., Boston and London, 1844), in which reference is made to the account of the trial by James M. Varnum, Esq., counsel for defendant, and to "Memoirs of Rhode Island Bar," by Wilkins Updike.

According to Chandler, the court did not hold the law requiring paper money to be accepted on a par with specie to be unconstitutional and void, but that "the information is not cognizable before them" (Id. 327). In other words, defendants' plea was mistaken for the adjudication.

The Assembly held that, inasmuch as the justices "were not charged with criminality in rendering their judgment, they be discharged from further attendance upon the Assembly on that account." The laws giving rise to the controversy were soon afterwards repealed, "and a better feeling prevailed in regard to the true principles of government" (Id. 350).

WILLIAM D. THOMPSON.

Uniform Law as to Legal Age

Eugene, Oregon, Dec. 27.—*To the Editor*: As one of the recent members of the American Bar Association, I have read with much interest, those articles of the JOURNAL touching the various uniform laws now upon the statute books, as well as those whose existence has been deemed advisable. Thus far, however, I have failed to observe any suggestion concerning a uniform law with reference to the age of majority. This has been brought to my attention through the fact that I have represented a client who is an heir to certain real property interests in the state of Wisconsin. She, being a resident of Oregon, became, under our law, of legal age upon her arrival at the age of eighteen years. I have been advised by my associates in Wisconsin, having the matter there in charge, that, under the law of the latter state, this young lady is a minor until she has reached the age of twenty-one years. The result of this is that while she is of legal age in Oregon, and her domiciliary guardian in Oregon has been discharged, she is yet under guardianship in Wisconsin, where her property is situate, and, for that reason is unable to receive and handle directly this property. Further the Wisconsin guardian, quite naturally hesitates to deliver to her personally in Oregon such proceeds from her property, as by the law of Oregon, she is entitled to receive and use, on account of the fact that by the law of Wisconsin she is a minor, whose right to receive might be questioned in that state.

I therefore take the liberty of suggesting that it might be wise to include a uniform legal age law among those for whose enactment the Association is striving. FRED E. SMITH.

Identification of Typewritten Forgery

"A writer in *Law Notes* some years ago made the contention, then rather novel, that forgery of typewriting was more capable of detection than forgery of handwriting. A recent case in New York illustrates aptly the truth of this contention. A man was accused of forging ten typewritten notes, aggregating $25,000. The press reports state that the signature was so well imitated that forgery could not be proved. But having proved that a letter in evidence was written by the accused on his own typewriter the prosecution put on the stand the well-known expert Albert S. Osborn, who pointed out convincing indications that the notes and the letter were typewritten on the same machine. For example, there was a break on a flange of the lower case 'm' and a break in the lower case 'o.' The lower case 'd' was out of alignment, its stem slanting sharply to the left. These defects appeared unfailingly in the notes and in the letter. On this evidence a conviction of forgery was secured. The probative force of this kind of testimony obviously depends on the number of defects or individual features to be found in the typewriting in question. One common defect may readily be ascribed to coincidence, two render this hypothesis less tenable, and the certainty of the proof increases with the number of common distinctive characteristics. The number of typewriting machines of the same make and using the same style of type is not very great, and the likelihood that two of these will in use develop say three identical defects and no others is so small as to be negligible."—*Law Notes*, November, 1922.